88-1605

No.

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID G. LUPO and JAMES STEMMLER,
Petitioners,

vs.

R. ROWLAND & CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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190 pp

QUESTIONS PRESENTED

I. Whether Due Process requires that a person against whom Rule 11 sanctions are sought be given notice of which specific paper(s) are alleged to have been signed in violation of the Rule prior to any evidentiary hearing or order imposing such sanctions?

II. Whether Due Process requires a District Court in imposing Rule 11 sanctions, to specify the papers it found violative of the Rule and to indicate in its order that the objective standard of Rule 11 was applied by the District Court as required by the Rule?

III. Whether Due Process requires that an attorney who along with his clients is the subject of a motion for sanctions under Rule 11 be given notice that a scheduled evidentiary hearing will pertain to sanctions sought against *the attorney* as opposed to his clients only?

IV. Whether a District Court has jurisdiction to impose Rule 11 sanctions when the motion therefor is a request for attorney's fees and costs filed in violation of the District Courts own Local Rules?

A. Does "entry of judgment" governing time limits for filing post-trial motions and appeals occur upon the preparation of a courtroom minute sheet describing the judgment and its recordation on the docket by the clerk?

LIST OF PARTIES

The parties to this proceeding are the Petitioners, attorneys David G. Lupo and James Stemmler, and the Respondents as follows: R. Rowland and Co., Inc., now known as Rowland, Simon & Co., a Missouri corporation, broker and underwriter; Julius Weiss, Irwin M. Rosenthal, Jacob W. Heller, Herman Schwartzman, Leonard I. Weinstock, David M. Carelick, Andrew W. Dave, Marcel Shwergold, Elkan Abramowitz, Edmond M. Coller, Richard F. Horowitz, Howard L. Mann, E. Cooke Rand, Howard S. Jacobs, Mitchell R. Mass, Edward Fingerman, the attorneys who prepared the motion picture limited partnership prospectus and performed other professional services for the partnerships; Laventhol and Horwath, an accounting partnership which prepared the tax returns and performed other professional services for the partnerships; Harold Rand, individually, and Harold Rand, d/b/a Harold Rand and Co., Public Relations, general partner of various limited partnerships; Joel Preston, general partner and appraiser of various Limited Partnerships; Irving Cohen, individually, Irving Cohen, d/b/a The Astor Group, Ltd., promoter, organizer and initial general partner of various Motion Picture Limited Partnerships; I.C.A. Productions, Inc., a dissolved New York Corporation, organizer and promoter of various Motion Picture Limited Partnerships; Irving Cohen and Associates Investors, Inc., d/b/a Irving Cohen and Associates, Inc., a New York Corporation, promoter and organizer of various Motion Pictures Limited Partnerships, Stanley Levine, an original limited general partner in a partnership and employee of Defendant Irving Cohen; Ted Shapiro, individually, and Ted Shapiro d/b/a The Astor Group Ltd., organizer, promoter and general partner of various Motion Picture Limited Partnerships; Raymond E. Rowland, Jr., President and employee of R. Rowland and Co., Inc. and Robert R. Rust, Vice President and employee of R. Rowland and Co.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, David G. Lupo and James Stemmler, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned proceeding on September 20, 1988.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in the Appendix hereto at page A 74.

The Order of the three-judge panel denying rehearing by the panel and rehearing en banc is reprinted in the Appendix hereto at page A 83.

The Order of the United States District Court for the Eastern District of Missouri imposing Rule 11 sanctions upon Petitioners is reprinted in the Appendix hereto at page A 70.

JURISDICTION

On September 20, 1988, the United States Court of Appeals for the Eighth Circuit issued its opinion affirming the District Court's Order imposing Fifty Thousand Dollars ($50,000.00) in sanctions under Rule 11, F. R. Civ. Pro. upon Petitioners. Rehearing was sought by Petitioners. On January 3, 1989, the Court of Appeals denied the request for rehearing, although Judge McMillian would have granted re-hearing. Judgment was entered on January 10, 1989.

Jurisdiction of the Court is invoked under 28 U.S.C. Sections 1254(1) and 2101(c).

RULES INVOLVED

Rule 11 of the Federal Rules of Civil Procedure, in pertinent part is set forth in the Appendix at pages A 118-119. Rule 58 of the Federal Rules of Civil Procedure is set forth in full at Appendix page A 124. Rule 30 of the Local Rules of the United States District Court for the Eastern District of Missouri is reprinted in full at Appendix page A 126.

STATEMENT OF THE CASE

Petitioners David G. Lupo and James Stemmler are St. Louis attorneys who represented eight individual plaintiffs in a complex securities fraud action brought in the United States District Court for the Eastern District of Missouri. Defendants in that action were the Respondents herein, among others. Petitioners' clients had invested in numerous motion picture limited partnerships organized and operated by Respondents.

On August 7, 1987, Judge George F. Gunn of the United States District Court for the Eastern District of Missouri impos-

ed a total of $100,000 in sanctions—$50,000 upon Messrs. Lupo and Stemmler and $50,000 upon their clients—supposedly under the provisions of Rule 11 of the Federal Rules of Civil Procedure. Judge Gunn's order (A 70)[1] contained no language specifying which pleadings or papers were signed by Petitioners or their clients in violation of the rule, and stated only that "the conduct of the litigation . . . *which comprises the bulk of the filings,* was frivolous and abusive. . . ." (Emphasis added). (A 72).

In their original complaint, Petitioners' clients alleged the Defendants (Respondents herein) had defrauded them of their investment capital by misrepresenting available tax benefits, failing to disclose the true cost paid for the movies, and organizing the partnerships to benefit general partners without returning a profit to limited partner investors. Violations of Rule 10b-5, common law fraud, breach of fiduciary duty and conversion were alleged. (Add. 19-20).

Pre-filing preparation by Petitioners was extensive. Messrs. Lupo and Stemmler conducted an eighteen-month investigation into the alleged fraud *prior* to the filing of the complaint. Former employees of Defendant Rowland, attorneys with the Internal Revenue Service, accountants and tax attorneys were consulted, extensive legal research was done, and a liability expert was engaged. The attorneys catalogued their exhaustive pre-filing efforts in affidavits. (App. 304-348; A 127).

Further, Petitioners' client Michael Kickham consulted in 1982 with two other St. Louis attorneys, both of whom concluded Mr. Kickham had a meritorious fraud claim. (App. 41-45, 383). Thereafter, one of the attorneys, a tax expert wrote a letter to the Plaintiffs stating "there is reason to believe based on

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[1] References to the Appendix herein will read "A 1" referring to Appendix page 1, and so on. References to the record below will be as follows: "Add." will refer to the Petitioners addendum filed with their appellate brief; "App." will refer to their appendix filed below; "Supp. App." will refer to their supplemental appendix below.

the information uncovered by us that each of you may have federal causes of action against various individuals and entities for what has occurred with respect to each of the Partnerships." (Affidavit of Philip Kaiser, App. 41-45).

Another St. Louis attorney, Joseph Devereaux, testified that he prosecuted several state court actions against some of the same defendants on similar grounds and was able to achieve a settlement for a "substantial" sum. (App. 401). In fact, one of the partnerships—the Antares Associates—was involved in both suits. Devereaux testified that his investigation showed that the partnerships were distributing prospectuses which grossly overstated the value of the motion pictures. (App. 401-406). Devereaux also stated that Mr. Lupo met with him on two or three occasions to "compare notes" during the pendency of both suits. (App. 401-402).

Mr. Lupo commenced deposition discovery on September 27, 1983. However, fundamental disputes arose early on concerning the appropriate scope of discovery. Defendants sought to limit Plaintiffs' discovery to the five partnerships they had invested in. Plaintiffs sought an expanded scope of discovery in reliance on their allegations of a much larger, organized securities scheme involving other parties who could only be identified through discovery. (Add. 20).

Mr. Lupo filed motions to compel in October and November of 1983. Initial magistrate rulings (App. 11-44) required Defendants to produce documents relating to the five partnerships invested in by Plaintiffs, two additional partnerships involved in Mr. Devereaux's lawsuit, and five additional partnerships as designated by Plaintiffs from *each* Defendant. (App. 11-44; Add. 4). Discovery was ordered to cease until the issues regarding the production of these documents were resolved. (App. 12). The District Court adopted the Magistrate's findings. (App. 46-47).

Respondents resisted these orders, claiming they were required only to produce documents concerning a *combined total*

of five additional partnerships. Again, Mr. Lupo was required to file motions to compel, and finally on November 8, 1985, Judge Gunn ordered that Mr. Lupo's interpretation of the prior orders was correct. The Court ordered Defendants to produce the requested materials. (A 4-5).

In 1983 Mr. Lupo attended a three-day ABA Litigation Section seminar in California concerning the Racketeer Influenced Corrupt Organizations (RICO) Act to determine its applicability to the instant case. He consulted with various speakers and acquired guidance on his particular case. (App. 332-333). On February 14, 1984, he moved the District Court for leave to file an amended complaint, adding a RICO count.

The ensuing delay by the District Court in ruling on the motion was inexplicable. More than five months after Petitioners sought leave to file the amended complaint, District Judge Clyde Cahill held a hearing and told counsel that he would rule within 10 days. All discovery was held in abeyance until the matter was decided. (App. 55). Unfortunately, no ruling was ever made by Judge Cahill. The case lay dormant, despite several letters by Petitioners, encouraging the court to rule.

On July 31, 1985—*more than one year* after Judge Cahill's hearing and *seventeen months after* Petitioners' first appliction for leave to file the RICO count—Judge Gunn, who had just taken the federal bench, was assigned the case. At least a full year of discovery time, if not more, had been lost. Finally, on September 3, 1985, Judge Gunn granted Plaintiffs leave to add the RICO count. (A 3). The amended petition adding the RICO count, drafted and researched by Petitioners and signed by Mr. Lupo, was then filed, almost a year and one-half after leave was first sought.

Judge Gunn met informally with counsel on July 31, 1985. The Judge and lawyers agreed to a trial date of March 17, 1986; defendants were to produce the requested documents no later than August 31, 1985. Unfortunately, Judge Gunn never signed

the order until September 3, 1985. (A 3). To that date, Defendants had yet to produce the documentary evidence requested. Much of it was never produced until shortly before trial almost *two years* after it was requested.

On December 18, 1985, Mr. Lupo collapsed in court, was hospitalized for an occlusion of his carotid artery, and was rendered medically unable to continue in the case. (Supp. App. 75-168). His then-partner, James Stemmler, who had been involved in the case only to perform discovery and research tasks, sought a continuance. Messrs. Lupo and Stemmler also sought leave to withdraw. (Add. 7-9). In addition, Mr. Stemmler filed an affidavit with the District Court, stating he was incompetent to try a securities fraud-RICO case, and that he was unfamiliar with the case, theories, parties and evidence. (App. 485-486). Both motions were denied (Add. 10; App. 100).

Meanwhile, on December 20, 1985, Mr. Stemmler was directed by Judge Gunn to proceed with an accelerated deposition schedule before a special commissioner. (A 9-10). The discovery schedule was grueling — in twenty-nine (29) days, thirty-three (33) depositions were taken in St. Louis, New York, California and Washington, D.C. (A 11-12). The valiant efforts of Plaintiffs' counsel were praised by the commissoner on the record. (App. 127-128).

On March 13, 1986, District Judge Gunn overruled Defendants' motions for summary judgment and directed trial to commence on March 17, 1986. (A 14). In his order, Judge Gunn acknowledged the severe time restraints and pressures imposed on Plaintiffs' counsel. (A 16).

But on the first day of trial Judge Gunn orally set his March 13 orders aside and permitted Defendants to orally resubmit their motions for summary judgment. (App. 149-152). Mr. Stemmler was then — on the day trial began — told he would be given three days to present sufficient evidence to overcome the motions. (App. 150). Plaintiffs were able to present the

testimony of only one witness before Judge Gunn excused the jury on March 20, 1986. (App. 183-184).

The case was recessed until March 31, 1986 when, at a hearing in open court, Judge Gunn sustained Defendants' motions for summary judgment. (App. 191). The Court's deputy clerk, Barbara Kramer, noted the Court's judgment on a courtroom minute sheet, stating the date, time and nature of the judgment. (A 17). The minute sheet was signed by Ms. Kramer and stated "Court grants Motions for Summary Judgment in favor of Defendants. Order to be entered forthwith. (GFG)." (A 17). In keeping with the Court's practice, the minute sheet was immediately sent to the clerk's office where a deputy clerk entered the judgment on the Court's docket book, noting that entry occurred on March 31, 1986. (Add. 15). (See "EOD 3/31/86," meaning "entered on docket on March 31, 1986). The civil minute sheet was initialed in the top right-hand corner, confirming its entry on the docket. (Add. 15).

On April 17, 1986, Judge Gunn filed an opinion explaining the basis of his ruling, stating he granted summary judgment on March 31, 1986. (A 18). Judge Gunn's language is confusing:

> IT IS HEREBY ORDERED that the motions of defendants for summary judgment be and are granted.
>
> This Court granted summary judgment in favor of defendants on all counts of plaintiffs' complaint at the conclusion of a hearing held on March 31, 1986 at 9:00 a.m. in open court. The Court files this memorandum to state the basis for its ruling from the bench. . . . (A 18).

Respondents herein filed their Joint Application for Attorneys' Fees and Expenses (A 32) on May 7, 1986—exactly 21 days after the April 17 opinion of Judge Gunn, but more than 21 days after the March 31 entry of the clerk's minute order on the docket. The Application sought approximately $1 million in attorneys' fees and costs as sanctions under Rule 11, 28 U.S.C. Section 1927 (A 118) and the "inherent powers" of the court.

(A 113). It referred to dozens of documents (A 33), but never specified a Rule 11 violation. Petitioners responded on behalf of their clients (plaintiffs below), item by item. (A 53-68).

An evidentiary hearing was set July 20, 1987 (A 69) after a preliminary hearing on July 7, 1987. (A 52). Still no notice regarding the allegedly violative papers had been given. As a result, Petitioners decided to submit affidavits and did not specifically request an evidentiary hearing. (App. 278). However, plaintiffs' new counsel (representing Petitioners' former clients) did request a hearing (App. 285) and the Court indicated that one might be held (App. 300-301). At this preliminary hearing the district court indicated its difficulty with what Due Process required:

> Mr. Leonard: Your Honor, I think that to force the plaintiffs to respond in this case on affidavits deprives them of their constitutional rights to due process.
>
> The Court: Well, there's some question, it depends on what develops. We may or may not be right. Depends on what develops. . . .
>
> Mr. Leonard: For the record, we have filed a motion for an evidentiary hearing, never been ruled on. We came here today assuming that it was denied, that was the information we'd received from the Court.
>
> If that motion is allowed, we intend to ask for leave to conduct discovery on limited issues that would bear on the imposition and allocation of sanctions.
>
> The Court: Okay. Well, I think we'll go ahead and proceed, Mr. Clear, and as I say, there's much to be learned on the Rule 11 proceeding. (App. 246-247). . . .
>
> Mr. Ebert: If the Court please, these affidavits have just been served on us this morning. . . . Could we have leave to study them and file counter affidavits if we feel necessary?

> The Court: Well, I tell you, we're getting into—I'm going to let you know on the evidentiary hearing. . . . And if I do that, if we do have an evidentiary hearing I suspect you won't need to do that. If there's no evidentiary hearing then I suppose maybe you'll be allowed to file a counter affidavit. . . . (App. 300-301).

While the plaintiffs were given a later opportunity to present testimony at an evidentiary hearing, Petitioners were not. The District Court's notice of the hearing did not mention Petitioners — only the plaintiffs, their former clients (A 69). At neither hearing was there any mention of the specific paper(s) or pleading(s) that was allegedly signed in violation of Rule 11. (App. 243-302; 349-483). However, Respondents took the opportunity to tell the Court that they believed Rule 11 was the preferred basis for the imposition of sanctions. (App. 252). Further, counsel for Respondent Rowland argued that the *entire case* was "frivolous" (App. 248). On August 7, 1987, Judge Gunn issued his order imposing Rule 11 sanctions (A 70).

Petitioners appealed to the United States Court of Appeals for the Eighth Circuit arguing, among other things, (A 1-2) that the Respondents' Application for Rule 11 sanctions was filed too late under the provisions of Local Rule 30 of the District Court. Petitioners contended that "entry of judgment" occurred March 31, 1986 upon the entry on the docket of the clerk's courtroom minute sheet. Petitioners further argued that the Court's later written opinion could not be the judgment, which, under Rule 58 of the Federal Rules of Civil Procedure, must be set forth on a "separate document." (A 124).

The Eighth Circuit affirmed the District Court in an opinion issued September 20, 1988 (A 76). In that opinion, the Court of Appeals concluded that "in actuality *there was no entry of judgment on the merits* from which the twenty-one day time limit of local Rule 30 began." (A 78) (Emphasis added). Further the Court of Appeals held that the District Court "based its

decision" upon the "full record of the case," and stated that "the amended petition adding the RICO count certainly meets the requirement of a pleading signed in violation of Rule 11" (A 81). On January 3, 1989, the Eighth Circuit denied rehearing en banc and by the panel. Judge McMillian would have allowed rehearing. (A 83). The Eighth Circuit's judgment was entered January 10, 1989.

After the imposition of these sanctions, Petitioners and their former clients were sued by former defendant Irving Cohen (Cause No. 88-2018-C-A) in the U.S. District Court for the Eastern District of Missouri and by former defendants Harold Rand and R. Rowland & Co. in the Circuit Court of the City of St. Louis (Cause No. 892-00606). Both suits allege malicious prosecution and seek to recover attorneys' fees and costs — the same relief sought by their Rule 11 motion herein. In addition, Petitioners were sued by their former clients for legal malpractice. All of these cases are still pending. Further, the Respondents herein have filed a bill of costs pursuant to Rule 54(d), F. R. Civ. Pro., seeking the same attorneys' fees and expenses they sought in the Rule 11 proceedings herein (almost $1 million).

REASONS FOR GRANTING THE WRIT

The 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure inaugurated a new era of sanction imposition in federal practice. Ever since the Rule has been inconsistently applied and has sparked the District Courts to scour the shelves in search of other means to punish. Among the other tools employed are 28 U.S.C. Section 1927, Federal Rules of Civil Procedure 26(e) and 26(g) (A 118-126), as well as the "inherent powers" of the courts. (A 113).

A review of the decisions in the various Circuits demonstrates that the federal courts are without any consistent and integrated guidelines for imposing sanctions. Thus, the recent dramatic increase in sanctions orders has done little to achieve its ultimate goal — the education of the public and the Bar such that litigants can conform their conduct to such standards, clearing the courts of frivolous cases and abusive practices. Surely this was the desire of the drafters of the 1983 amendments to Rule 11. The Notes of the Advisory Committee on Rules of the 1983 amendment indicate deterrence is the major goal. (A 84).

However, tangled and confused decisions like the District Court's herein only hinder and frustrate the purposes of the Rule. *Bastien, et al. v. R. Rowland & Co. (Bastien II),* 857 F.2d 482 (8th Cir. 1988). (A 74). Unfortunately, decisions providing clear guidance from the Courts of Appeal have been few. Even when viewed in the most optimistic light, amended Rule 11 must be considered a disappointment—at least thus far. The Rule, designed to reduce and streamline litigation, has generated plenty of litigation of its own,[2] its concern with minimizing "satellite litigation" notwithstanding.

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[2] A review of West's Federal Practice Digest 3rd reveals that Rule 11 indeed may be viewed as a disaster. Key number 2721, Federal Civil Procedure, contains *51 pages* of Rule 11 decisions, many of which are appellate decisions, in the current 1988 *pocket part alone.*

The instant case presents the Court with an excellent opportunity to reach a variety of Rule 11 issues, settle numerous differences which have arisen between the Circuits, and provide much needed guidance. Consistency in application of Rule 11 is critical, especially in light of the potential "chilling effect" of the Rule upon litigants and, more important, their attorneys. There are already critics who cite statistics indicating that the Rule is chilling litigation of unpopular causes (A 90-91). The only way to protect against such evils is the even-handed application, employing the same prescribed procedures and analysis in each case. Such a practice would give some predictability to the Rule and allow attorneys to learn from it. Without some predictability, the Bar will be left without a clue and the Rule will fail. (A 99-107).

The instant case provides the Court the opportunity to settle numerous issues: (1) whether a District Court must specify the paper(s) it found violative of the Rule so that the violator can know what he has done wrong; (2) the extent to which traditional Due Process (A 118) safeguards (including notice and participation in an evidentiary hearing) are required in a case involving substantial amounts of sanctions (here the Respondents sought approximately $1 million); (3) whether the Rule can reach only specific papers, or broader conduct which might be sanctionable by other Rules and statutes; (4) whether Rule 11 can reach an attorney who participated in the case but did not sign the allegedly violative papers; (5) whether Rule 11 requires a continuous re-evaluation by the signer of previously signed and submitted papers; (6) whether a courtroom minute sheet can serve as a "judgment" for purposes of entry of judgment; (7) when "entry of judgment" occurs for timing of post trial motions and appeals; (8) whether a District Court has jurisdiction to impose Rule 11 sanctions if the application therefore was not timely filed under a mandatory jurisdictional Local Rule; (9) whether Rule 59(e) of the Federal Rules of Civil Procedure applies to limit the time for filing a motion for Rule 11 sanctions, thereby restricting a court's jurisdiction to sanction; (10)

whether a pleading, once approved by a court, can be the basis of later Rule 11 sanctions by that court; (11) whether res judicata bars the re-sanction of an attorney or party under Rule 11 for already-sanctioned conduct, and (12) whether res judicata bars a party from seeking attorneys fees and expenses by a Rule 54(d) bill of costs or by an action for malicious prosecution when the same relief has been denied or partially denied in previous Rule 11 proceedings.

Further, this case is particularly important because it involves Rule 11 sanctions against attorneys. As the Second Circuit said in *Oliveri vs. Thompson,* 803 F.2d. 1265, 1281 (2d Cir. 1986) "[b]ecause of their leveraged impact on the litigation process . . . sanctions against attorneys should not be given such a broad-brush approach." *Id.* Missouri lawyers have already read an article in the *Journal of the Missouri Bar,* concerning the implications of the Rule 11 decisions of the District Court and Eighth Circuit in the instant case. (A 92). In the article, the author Mark Berry, a claims attorney for the Missouri Bar Plan, (the Missouri Bar's professional liability self-insurance plan) summarized the Eighth Circuit opinion below as follows:

> It is not necessary for a court to identify a specific pleading that is in violation of the rule when imposing sanctions. Sanctions can be based on the "bulk of the filings" and the "full record of the case" in general and not on a specific pleading. (A 95).

Mr. Berry accurately reported the significance of the opinion, but Petitioners submit that it is *bad law.* As stated herein, proper Rule 11 analysis is impossible without reference to specific pleadings. The impact of Rule 11 is too great, the stakes too high for the Court to wait any longer to correct the misconceptions and misapplications of this critical Federal Rule. Petitioners urge the Court to grant a Writ of Certiorari herein so that such misinterpretations of the Rule can be corrected now and avoided in the future.

I. The Decision Below Conflicts With Rule 11 Itself And Decisions In Other Circuits Requiring District Courts To Specify The Paper(s) Held Violative Of The Rule.

The District Court's decision below made no reference at all to any papers which were signed in violation of Rule 11. Nevertheless, the District Judge imposed $100,000 in sanctions — $50,000 to Petitioners and $50,000 to their clients. For justification, the District Judge pointed to general conduct issues and referred to the "bulk of the filings." (A 72).

Likewise, the Respondents' Joint Application for Attorney's Fees and Expenses (A 32-38) under Rule 11 *mentioned* dozens of documents, but never argued that any one or more of them was particularly violative of Rule 11; instead it argued that Petitioners' general conduct was sanctionable, an issue contested by Petitioners below. Yet, despite the vagueness of Respondents' Application, it was still more specific than the District Court's order, which actually broadened the apparent scope of the scrutiny by referring to the "bulk of the filings."

It was not until the Eighth Circuit's decision on September 20, 1988 affirming the sanctions that Petitioners were finally "informed" that their September 1985 amended petition adding their civil RICO count *apparently* was the key document. The Eighth Circuit recited the same general findings of the District Court and then stated:

". . .The amended petition adding the RICO count certainly meets the requirement of a pleading signed in violation of Rule 11." (A 81).

Thus the Eighth Circuit went beyond its appellate jurisdiction and tried to "rewrite" the District Court's decision for it *when a remand for further proceedings in compliance with the Rule was in order.* See *Brown v. Federation of State Medical Boards of the United States,* 830 F.2d 1429, 1438 (7th Cir. 1987). Petitioners should have then been given the opportunity to be heard

on the reasonableness of their filing of the RICO count at the time of its signing and submission—but again they were denied.[3]

These events expose obvious Due Process problems: Petitioners were advised of the pleading they were supposed to be defending all along *only after* they were asked whether they wanted an evidentiary hearing; *only after* they prepared and submitted their affidavits in defense of the Rule 11 sanctions being sought; *only after* the imposition of $100,000 in sanctions ($50,000 against them personally and $50,000 against their clients), and *only after* briefing and arguing their defense to the Eighth Circuit (a defense significantly hindered by the fact that Petitioners and their counsel were forced by the vagueness of the motion for the sanctions and District Court's order to defend the *entire record*, one which the District Court noted was comprised of *24 volumes*). (A 71).

It is abundantly clear from the Notes of the Advisory Committee that proper Rule 11 analysis requires the identification of specific pleadings because pleadings are to be tested by looking to what the attorneys knew or reasonably should have known *at the time of filing or submission*. (A 85). This is designed, according to the Advisory Notes, to prevent *post hoc* reasoning or the use of hindsight:

> The standard is one of reasonableness under the circumstances...The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight *and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.*

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[3] It should be noted that Petitioners amended their original RICO count on November 22, 1985 by interlineation, and that the Defendants raised no objection thereto and the case proceeded to trial on the amended RICO count. The amended pleading passed the test of Defendants' motions for summary judgment (A 14-16).

Notes of the Advisory Committee on Rules, Rule 11, F. R. Civ. Pro. (A 85)

Of course, to test the reasonableness of a pleading or paper *at the time* it was signed and submitted presupposes that a specific filing or submission date can be identified, else the "circumstances" facing the signer at the time can never be identified and evaluated by the Court considering the sanction. *Ipso facto,* a specific pleading *must* be identified. This never occurred in the instant case, and thus proper Rule 11 analysis never occurred. The Eighth Circuit opinion ignored these defects entirely.

A close reading of Judge Gunn's order also shows that he confused or mixed the standards governing the imposition of sanctions under Rule 11 with those to be used under 28 U.S.C. Section 1927 (A 118) and the courts inherent powers. (A 113) Never did the District Judge conclude that, at the time of the filing of any pleading, Petitioners failed to meet the standard of reasonable attorneys in the circumstances. On the other hand, the order made much ado of the fact that the lawsuit was unsuccessful, involved a lengthy dispute over several discovery issues and cost a lot of money to litigate (A 70-73). Petitioners urge that hindsight did, in fact, influence the outcome, and was, in fact, the *only* basis for the order. No analysis prescribed by the Rule was performed.

In the instant case, the District Court ignored the signing and certification requirement imposed by the Rule. The $50,000 sanction was imposed against both Messrs. Lupo and Stemmler, but no papers were submitted which were signed by both of these lawyers. Still the District Court and the Eighth Circuit neglected to identify the signer of any documents because no specific documents were ever identified as being under Rule 11 scrutiny. This reinforces Petitioner's claim that these sanctions were not tied to any paper or pleading as required by the Rule, but rather to the District Court's belief that the litigation was conducted in bad faith. Judge Gunn *even makes a finding of*

bad faith, when that clearly is never at issue in proceedings under the amended Rule 11 (A 73).

The Fifth Circuit has addressed the importance of adhering to the signing and certification requirement:

> The purpose of the signature is to allow a court to easily identify the person or people upon whom it can place responsibility for a particular document . . . Limiting rule 11 sanctions to the attorney who signs the document reduces the need for satellite litigation over exactly who was responsible for a particular document. If this view of rule 11 were not adopted, an inquiry would have to be made of the relative culpability of attorneys who did sign but who were nevertheless involved with a particular document. This would necessitate the type of satellite litigation that rule 11 expressly discourages.

Robinson v. National Cash Register Co., 808 F.2d 1128-1129.

For these reasons, as well as to insure fairness to those facing Rule 11 sanctions, a number of Circuits have required their District Courts to make findings that specific papers were signed in violation of the Rule. Perhaps the most significant decision is the *Brown* case, *supra,* where the Seventh Circuit explained why specificity is so critical in Rule 11 orders where substantial amounts of sanctions are imposed:

> We conclude that the district court's lump-sum award was deficient . . . because the court's findings lacked the necessary specificity for this court to review and uphold the award. Therefore, we remand. . . .
>
> In light of the need for this Court to again remand for more particular findings, we now request that in cases involving substantial awards a district judge state with some specificity the reasons for the imposition of a sanction, and the manner in which the sanction was computed. . . . *If the district court makes specific determinations, then the ap-*

> *pellate court can clearly follow the path that the district court took. Id.* at 1437-1438. (Emphasis added).

Other courts have also indicated a need for specificity. *See Sanko S. S. Co. Ltd. v. Galin,* 835 F.2d 51 (2d Cir. 1987); *Szabo Food Service v. Canteen Corp.,* 823 F.2d 1073, 1084 (7th Cir. 1987) and *Ho v. Martin Marietta Corp.,* 845 F.2d 545 (5th Cir. 1988).

Rule 11 has created a burgeoning body of law, despite the Advisory Committee's plea that the Rule not produce "satellite litigation." Unfortunately, as in so many cases, the satellite Rule 11 litigation in this case has taken over. *See Golden Eagle Distrib. Corp. v. Burrough Corp.,* 801 F.2d 1531, 1537 (9th Cir. 1986). Again the *Brown* court saw the need for guidance.

> To avoid prolonging and complicating such Rule 11 satellite litigation, we have sought to provide the district courts with some guidance as to the criteria this court will use in evaluating a Rule 11 award. District courts should provide specific findings when awarding substantial compensatory sanctions.

Brown, supra, at 1440.

The Fifth Circuit has concluded that the justification for Rule 11 sanctions must be apparent, else it will remand so that the District Court can issue specific findings of fact. *Thomas v. Capital Security Services, Inc.,* 836 F.2d 866, 883 (5th Cir. 1988). Also see *Robinson v. National Cash Register Co., supra,* at 1127-1129. The Second Circuit has likewise required specificity in imposing sanctions under 28 U.S.C. Section 1927 and Rule 11. Petitioners urge the Court to note the similarity between the District Court's order herein and that referred to by the Second Circuit in *Oliveri v. Thompson,* 803 F.2d 1265, 1275 (2d Cir. 1986):

> In making its decision, the district court spoke in general terms and awarded attorneys' fees and costs against both

> Graseck and Oliveri "for instituting meritless claims and for continuing the prosecutions of claims after it became apparent that they were without a factual or legal basis." District court's order at 15. To validly impose a sanction of attorneys' fees in this case, however, *closer analysis than this is required. Id.* (Emphasis added).

The Third Circuit has also indicated its strict adherence to the language of Rule 11. In *Eavenson, Auchmuty & Greenwald v. Holtzman,* 775 F.2d 535 (3rd Cir. 1985), the Third Circuit emphasized that the Rule's provisions are triggered only by the signing of specific paper(s)[4] and require analysis of what was reasonable *at the time of submission. Id.* at 540-541. The Fifth Circuit agrees. *Thomas, supra,* at 874. And in cases involving other types of sanctions, the Second Circuit has required a "high degree of specificity" in orders awarding attorneys' fees as sanctions in recognition of the chilling effect that such awards may have on litigation. *Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli,* 84 F.2d 115, 119 (2d. Cir. 1987). This requirement is a "sound means of ensuring that persons with colorable claims will not be deterred from pursuing their rights by the fear of an award of attorneys' fees against them." *Weinberger v. Kendrick,* 698 F.2d 61, 80-81 (2d. Cir. 1982), citing *Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078 (2d. Cir. 1977).

And notably, even Judge Schwarzer, whose well-known treatise on Rule 11 has been both revered and debated, favors specific findings of fact in Rule 11 orders:

> The rule does not require findings of fact or conclusions of law. But findings and conclusions, even if only brief, serve at least three useful purposes: (1) they assist in the ap-

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[4] Also see *National Association of Government Employees vs. National Federation of Federal Employees,* 844 F.2d 216, 222 (5th Cir. 1988) and *In re Disciplinary Action Against Mooney,* 841 F.2d 1003, 1005 (9th Cir. 1988).

> pellate review, demonstrating that the trial court exercised its discretion in reasoned and principled fashion; (2) they help assure the litigants, and incidentally the judge as well, that the decision was the product of thoughtful deliberation, and (3) their publication enhances the deterrent effect of the ruling.

Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 199 (1985). It is abundantly clear that some standard of specificity with regard to the basis for all Rule 11 orders needs to be set by this Court and followed in all cases. Even the Eighth Circuit has said it *prefers* specific findings but saw fit to ignore its preference in this case. (A 80).[5]

II. The Decision Below Is Inconsistent With Petitioners' Due Process Rights

The Eighth Circuit rejected Petitioners' arguments that they were not afforded a meaningful opportunity to defend themselves because they were not given fair notice as to which papers were the basis of the sanctions. The Court of Appeals stated that although it *preferred* the identification of specific papers when Rule 11 sanctions are imposed, "we find that the district court had adequate support for proceeding as it did and that Lupo and Stemmler had fair notice of the basis of the court's ruling." (A 80-81). Never does the Court of Appeals say why it arrives at this bald conclusion.

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[5] In its most recent statement on the issue, the Eighth Circuit has apparently adopted the 7th Circuit's view as set forth in *Szabo, supra,* holding that the district court need not make detailed factual findings and conclusions of law *so long as* the ruling is adequate to give the Court of Appeals a clear understanding of the grounds of the decision. *E.E.O.C. v. Milavetz & Associates,* 863 F.2d 613, 614 (8th Cir. 1988). Petitioners submit that with no pleadings identified in the District Court's order, the Court of Appeals could not possibly have had a clear understanding of the Rule 11 analysis of the District Court, assuming proper analysis ever occurred. Further, the *Szabo* court found factual finding necessary where $10,000 in sanctions were sought. *Szabo, supra,* at 1084. *Here $1 million was being sought!*

Petitioners urge that, without fair notice of which paper(s) were allegedly violative of the Rule prior to the evidentiary hearing, their opportunity to participate in such a hearing was meaningless for Due Process purposes. Petitioners could not effectively prepare to defend themselves against the laundry list of allegations contained in the Defendants' Application for sanctions. (A 33-34).

Petitioners did not present their oral testimony because there was virtually no limit to the scope of the inquiry. Further, when the District Court *later* set an evidentiary hearing, it did not notice Petitioners (A 69) and thus Petitioners and their counsel believed the Court was considering only sanctions against their former clients, the plaintiffs. Petitioners submitted affidavits but did not believe sanctions would issue against them without notice of the hearing and so they did not object or seek to prepare additional or more specific affidavits. However, if sanctions were to issue against them, it is clear that Petitioners had a right to a meaningful chance to defend themselves. See *Donaldson v. Clark,* 819 F.2d 1551, 1560 (11th Cir. 1987).

Without notice of either the papers under scrutiny or the evidentiary hearing itself, Petitioners submit that they were rendered incapable of defending themselves against the Rule 11 proceedings below. In particular, how could Petitioners show the court what was reasonable at the time of signing and submission if the document(s) in question was *never identified?* The Advisory Committee may have been concerned about limiting "satellite litigation" but it never intended Due Process to be compromised along the way:

> The procedure (for deciding Rule 11 motions) obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration (A 88).

The instant case hardly concerns a trifling sanction. Almost $1 million in sanctions were being sought; $100,000 in sanctions

were awarded.[6] The District court should have taken measures to ensure that Petitioners had fair notice of what papers were under scrutiny prior to any hearing and prior to its decision. The District Court was even more remiss in failing to identify the violative papers *in its order imposing the sanctions* — an omission which sacrificed Petitioners' Due Process rights a *second* time, forcing their appeal to the Eighth Circuit to defend the entire 24-volume record. Still Petitioners were unaware of the pleading(s) or paper(s) which wrought the sanctions upon them.

Only *after* briefing and argument to the Eighth Circuit were the Petitioners given a clue. And even then, the Eighth Circuit could only *guess* as to basis of Judge Gunn's Rule 11 order, stating the amended petition adding the RICO amendment "met the requirements" of a Rule 11 violation (A 81). But the Court of Appeals certainly could not say with any certainty that the RICO count actually was the source of the District Court's decision.

III. The Public Interest And The Efficient Administration Of Justice Are Best Served By A Clear And Consistent Appplication Of Rule 11, Requiring The Identification Of Violative Papers.

It is not disputed here that Rule 11 is a good and necessary provision in federal practice. However, the troublesome inconsistency of its application over its first few years has shaken the

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[6] In *Szabo, supra,* the Seventh Circuit rejected the Fifth Circuit's position in *Thomas, supra,* but noted that findings still would be required in "serious" Rule 11 cases: "When the motion for sanctions is foolish...the judge need not belabor the obvious. But when the motion is serious, a judge ought to treat it seriously...A serious Rule 11 motion is not a gnat to be brushed off with the back of the hand." *Id.* at 1084. Petitioners submit that, with $1 million in sanctions requested in the instant case, they were entitled to the utmost in Due Process guarantees.

confidence of lawyers and litigants and left them unsure as to what conduct will and will not subject them to sanctions.[7] The line between zealous representation and sanctionable conduct is perilously clouded. The Bar and the commentators are well aware (A 106). The current Rule 11 practice places the public's right to zealous representation and the attorney's self-interest in avoiding sanctions directly at odds. The equation has never been so complicated for a lawyer, and the "better safe than sorry" strategy has emerged the clear victor — but not without its costs. This "chilling effect" has been furthered by the increasing amount of the sanctions imposed.

Rule 11 was never intended to "chill" legitimate litigation. If it is to achieve its purpose and avoid a "chilling effect," it must be applied consistently, clearly and according to standardized procedures and requirements. Only then will all judges know what process is due. Only then will litigants and their counsel be able to accurately gauge their conduct against its standard. Only then will the Rule become predictably enforced, and thus of some value to litigants and lawyers in conforming their conduct.

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[7] Petitioners point to three recent illustrative and troublesome applications of the Rule: in *Eash v. Riggins Trucking, Inc., vacated on other grounds,* 757 F.2d 557 (3d Cir. 1985), the district court imposed Rule 11 sanctions on defense counsel after an eleventh-hour settlement prior to trial, reasoning that defense counsel should have offered more money sooner. In *Webster v. Sowders,* 846 F.2d 1032 (6th Cir. 1988), the Court of Appeals overturned a district court which had actually imposed Rule 11 sanctions on the basis of a motion to stay a court order pending appeal. *Id.* at 1040. The district court had reasoned that the underlying appeal was frivolous so the motion to stay its order violated Rule 11. And in *Snow Machines, Inc. v. Hedco, Inc.,* 838 F.2d 718 (3rd Cir. 1988), the Court of Appeals reversed Rule 11 sanctions on the basis of a proposed order which the District Court signed and later used as a basis for the sanctions. *Id.* at 719-724. These patent abuses of Rule 11 by the District Courts underscore the need for the identification of allegedly violative documents and specific findings. Otherwise sanctioned parties will be helpless to acquire relief on appeal, and will end up in Petitioners' unenviable position.

Obviously the Advisory Committee expected some assistance from the courts in determining what process is due. The *Brown* case, *supra,* is a fine example of a Court of Appeals giving guidance to its Circuit. Unfortunately, *Brown* is the exception and not the rule. The Eighth Circuit's decision in the instant case only makes matters worse. Now attorneys read that they or their clients can be sanctioned $50,000 or $100,000 for signing a pleading and not even be entitled to know which one it was (A 95). Clearly Rule 11 is an area ripe for intervention by this Court. And, while the public and the Bar await to be released from this quagmire, Rule 11 and the judiciary remain subject to increasing and unfortunate criticism that the Rule is being abused and is "freezing out" litigation related to unpopular causes. (A 90-91, 106).

IV. The Decision Below Is Inconsistent With The Doctrines Of Jurisdiction And Res Judicata.

The Eighth Circuit's opinion herein cannot be reconciled with the doctrines of jurisdiction and res judicata. The Eighth Circuit, straining to find grounds to affirm the District Court's sanction order herein, was forced to conclude that entry of judgment *never occurred* on the merits of the instant case (A 78). The court took this curious and ill-reasoned position even though it heard and decided an appeal of the merits, *Bastien v. R. Rowland & Co., (Bastien I),* 815 F.2d 713 (8th Cir. 1987), cert. denied 108 S. Ct. 160 (1987), and thus had already concluded that entry of judgment *had* occurred, *else it would never have had jurisdiction to decide that appeal in the first place.*

Petitioners urge this Court that it simply has to be one way or the other. Either entry of judgment occurred, and the Eighth Circuit's opinion herein is wrong, or no entry of judgment occurred and the Eighth Circuit never had the power to hear the appeal, leaving the merits of the instant case still open. Petitioners urge that the Eighth Circuit correctly decided the issue in its March 25, 1987 opinion on the merits when it stated that the

District Court granted summary judgment on March 31, 1986 (A 50).

The Eighth Circuit's reasoning that Petitioners "waived" their objections to the alleged failure to enter judgment is indicative of the troubled, results-oriented nature of the opinion (A 78). Petitioners are unaware of how any party can "waive" jurisdictional defects, especially by silence. Petitioners urged below that the courtroom minute sheet prepared by District Judge Gunn's courtroom clerk (A 17) met the requirements of Rule 58 and was, therefore, a judgment. The text of the sheet prepared at the rendition of judgment by the court, read "...Court grants motions for summary judgment in favor of defts. Order to be entered forthwith. (G.F.G.)." The sheet indicated that all counsel except one attorney was present (A 17). The text of the sheet was entered on the court's docket sheet the same day (Add. 15). Rule 79(a), F. R. Civ. Pro.

Thus Petitioners urge that judgment was entered on March 31, 1986. The Eighth Circuit reversed its field below however, ruling that a minute sheet cannot meet the "separate document" requirement of Rule 58 — but the Court of Appeals never says why not. Its opinion cites this Court's decision in *United States v. Indrelunas,* 411 U.S. 216 (1973), but Petitioners contend that *Indrelunas,* which adopts the teachings of Professor Moore and calls for mechanical compliance with Rule 58, actually favors their position. This Court stated, at page 221, as follows:

> As previously pointed out, when the court's decision, *whether written or oral,* is a simple grant of a sum certain or costs *or that all relief be denied,* the clerk is to prepare forthwith and sign a judgment which must be set forth on a separate document. Thereafter, the clerk is immediately to enter the judgment in the civil docket. (Emphasis added).

United States v. Indrelunas, supra, at 221, citing 6A J. Moore Federal Practice, 58-180 (1972). Further, this Court long ago

held that no particular form, words or act need be used to constitute a final judgment. *United States v. F. & M. Schaefer Brewing Co.*, 356 U. S. 232 (1958). An order granting summary judgment is a final judgment. *Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880, 883 (9th Cir. 1986). A one-line order can satisfy Rule 58. *United States v. Clearfield State Bank*, 497 F.2d 356, 358 (10th Cir. 1974); *Ellis v. Heckler*, 569 F. Supp. 792, 793 (E.D. Pa. 1983). Further, it is clear that the April 17, 1986 memorandum opinion of Judge Gunn (A 18) could not be the judgment. It clearly stated on its face that it was an opinion to "state the basis" for the court's "ruling from the bench." (A 18). See *Baity v. Ciccone*, 507 F.2d 717, 718 (8th Cir. 1974); *Cloyd v. Richardson*, 510 F.2d 485 (6th Cir. 1975); *Taylor v. Sterrett*, 527 F.2d 856 (5th Cir. 1976); *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683 (4th Cir. 1978) and 6A Moore, *Federal Practice*, Sections 58.02-58.02.1.

Local Rule 30 of the District Court below affirmatively limits requests for attorneys fees — they must be filed within 21 days of the entry of judgment on the merits. Petitioners urge that the rule clearly is a limitation of jurisdiction placed on the District Court by its own volition. It is not discretionary. See *Obin v. District No. 9 of the International Association of Machinists and Aerospace Workers*, 651 F.2d 574, 584 (8th Cir. 1981). Also see *Missouri National Education Association v. New Madrid County R-1 Enlarged School District*, 606 F. Supp. 25, 30 (E.D. Mo. 1984). The purpose of the rule is to prevent piecemeal appeals, i.e. to prevent the merits from going to the Court of Appeals in a different proceeding from an award of attorneys fees. In the instant case, Respondents violated Local Rule 30, *and surely enough, the Court of Appeals was caused to hear a second appeal concerning the award of attorneys' fees rather than only one appeal dealing with both the merits and the attorneys' fees issues.* Petitioners believe it is clear that entry of judgment occurred on March 31, 1986.

Respondents' Rule 11 motion, requesting almost $1 million in attorneys' fees, was filed May 7, 1986 — 37 days after entry of judgment and thus too late under Local Rule 30. Thus, the District Court exceeded its jurisdiction in imposing the instant sanctions. For the same reasons, the District Court, as of April 20, 1986 at the latest, was without jurisdiction to alter prior orders sanctioning plaintiffs (A 4, A 8, A 9) to shift those sanctions to Petitioners (A 44, A 46).[8]

Other circumstances point to the fact that judgment was intended to be entered on March 31, 1986. First, the minute sheet includes the directive "order to be entered forthwith," (A 17) indicating that the District Judge intended entry of judgment immediately. Second, the trial was before a jury, and the jury was dismissed on March 20, 1986 (A 77) — before the ruling from the bench on March 31, 1986. Petitioners cannot imagine why the District Court would dismiss the jury on March 20 but not intend entry of judgment for almost a month (April 17). Petitioners urge that it was clear upon the dismissal of the jury on March 20, 1986 that the orally re-submitted Respondents motion for summary judgment were going to be granted else Judge Gunn would never have dismissed the jury. To do so and then deny the motions would have required the seating of new veniremen and a repeat of voir dire. Thus, it is clear that judgment was intended to be entered as soon as he ruled — on March 31, 1986.

Further, lack of notice to counsel (a matter raised by Respondents below) is not an impediment to entry of judgment. See Rule 77(d), F. R. Civ. Pro. and Advisory Committee Notes. In addition, both District Judge Gunn and the Eighth Circuit stated that the summary judgments were granted March 31, 1986 (A 18, A 50, A 77). Finally, Petitioners filed their notice of

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[8] Also note the applicability of the 10-day limitation of Rule 59(e), F. R. Civ. Pro.

appeal on the merits on April 28, 1986 — within 30 days of March 31, 1986, and before the May 7, 1986 filing of Respondents' tardy Rule 11 sanction application.

Petitioners further question the vitality of the Eighth Circuit's reliance on *Obin, supra,* for the proposition that Rule 11 sanction proceedings are not subject to the 10-day limitation of Rule 59(e), F. R. Civ. Pro. The Eighth Circuit's recent opinion in *Kurkowski v. Volcker,* 819 F.2d 201, 203 (8th Cir. 1987), seems to conflict with *Obin* and indicates that Rule 59(e) might apply to Rule 11 sanction motions. The Court of Appeals ruled that the Rule 11 motion in *Kurkowski* met the Rule 59(e) requirement — a curious statement if Rule 59(e) simply does not apply as the Eighth Circuit opinion below suggests. If this Court finds that Rule 59(e) does apply to Rule 11 motions, the District Court clearly exceeded its jurisdiction as Respondents' Rule 11 application was filed well after Rule 59(e)'s 10-day limitation.

Further, Petitioners urge that, if Petitioner's initial RICO pleading was the basis of the sanction herein, the District Court exceeded its jurisdiction because it found that the Petitioner's first amended petition, which added a RICO count and was later amended by interlineation on November 22, 1985 (A 6), posed material issues of fact sufficient to survive Respondents' summary judgment motions (A 14). Once a court approves a pleading or paper, Petitioners urge that, without more, it cannot serve as the basis for Rule 11 sanctions. *Snow Machines, Inc., supra.* It is noteworthy that the Respondents did not file any motions or objections to the RICO count after its November 1985 amendment, and that the case proceeded to trial on the amended RICO pleading — facts that the Eighth Circuit seemingly ignored. Further, the RICO count was amended *prior* to the filing of any Rule 11 motion.

Petitioners urge that there are at least two res judicata issues herein which this Court should decide. First, the vague nature of the District Court's order leaves open the possibility that

Petitioners were *re-sanctioned* for previous conduct that had already been sanctioned. Petitioners had been sanctioned twice before in this action once for $2,025 (A 8-10) and once for approximately $10,300 (A 13).[9] Without specificity in the Rule 11 order, Petitioners submit that they were re-sanctioned because of general findings regarding their conduct (which resulted in the prior sanctions) and never violated Rule 11 at all.

Second, Respondent's multiple attempts at recovering their attorneys' fees (through a Rule 11 sanction proceeding, a Rule 54(d) bill of costs and by separate malicious prosecution actions against Petitioners) raise res judicata issues. Respondents elected their remedy and sought recovery of all their fees and expenses in the Rule 11 proceeding herein. Petitioners urge that the issue of reimbursement of these fees and expenses has now been determined, despite Respondents' repetitive efforts to obtain this same relief. The District Court only awarded $100,000 in Rule 11 sanctions, and the Respondents herein are engaged in this additional and repetitive litigation in order that they might recover the other $900,000 they originally sought below.

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[9] This Court should note that the District Court's May 8, 1986 and May 27, 1986 orders (A 44-47), both issued outside the 10-day limit of Rule 59(e), *shifted* previous sanctions (A 8-10, A-13) against plaintiffs to plaintiffs' counsel, Petitioners herein, without notice or hearing.

CONCLUSION

If Rule 11 is to have a salutary effect on federal practice, the Bar will need to learn and appreciate what is sanctionable and what is not. Nothing can be learned if attorneys are not even told what papers are the basis of the sanction. This is especially true where such grave amounts of Rule 11 sanctions are sought and awarded. Specificity is the cornerstone of the Rule's success. Without it, we will see ever increasing sanctions for the sake of sanctions, and our courts will remain clogged — now with Rule 11 litigation and appeals. Nothing will be learned, nothing will be improved and abusive litigators will be banished only to be replaced by paranoid conformists, unable to reliably differentiate zealous representation from sanctionable conduct. This Court will have traded one problem for another, and the confidence of the public in the judiciary and the legal system will have been weakened, not strengthened. Petitioners urge this Court to issue its Writ of Certiorari herein.

Respectfully submitted,

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March 30, 1989

APPENDIX A

POINTS OF ERROR RAISED BY PETITIONERS ON APPEAL BELOW

I. The district court lacked jurisdiction to impose Rule 11 sanctions because defendants' joint application for such relief was a request for attorneys' fees which was not filed within twenty-one days of the entry of judgment on the merits, as required by Rule 30 of the local rules of The United States District Court for the Eastern District of Missouri.

II. The district court lacked jurisdiction to impose Rule 11 sanctions because defendants' joint application for such relief constituted a motion to amend the court's final judgment which was not filed within ten days of the entry of summary judgment on the merits of the case as required by Rule 59(e) of the Federal Rules of Civil Procedure.

III. The district court abused its discretion in imposing Rule 11 sanctions because the court did not identify any papers which it considered violative of Rule 11, the court employed the wrong legal standard in considering whether to impose such sanctions and there was insufficient evidence in the record to justify such sanctions.

IV. The district court did indeed render a final judgment on the merits on March 31, 1986, and that judgment was reduced to writing by the clerk, signed by the clerk, and duly entered on the docket sheet on March 31, 1986.

V. The district court abused its discretion because there was, in fact, insufficient evidence in the record to justify the imposition of Rule 11 sanctions against appellants.

VI. The district court's ruling imposing the instant sanctions was vague and confusing as to what violations of Rule

11 were found, which attorney was responsible, what legal standard was employed, and how the liability for the sanctions is to be apportioned between the appellants.

VII. *Davis v. United States* is persuasive authority on the precise issue of whether Rule 59(e) of The Federal Rules of Civil Procedure precluded the district court from jurisdiction to impose Rule 11 sanctions in the instant case.

VIII. The imposition of sanctions was improper because appellants in fact possessed evidence to support their allegations against defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 82-950C(6)

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

STIPULATED PROPOSED ORDER

(Filed: September 3, 1985)

1. The court sustains Plaintiffs' Motion for Leave to Amend Complaint by adding the RICO Count.

2. This matter is removed from the Court's August 5, 1985 trial docket, to be reset at a later date.

3. All parties are directed to complete all answers to interrogatories and produce all documents set forth in the Court's orders of January 26, 1984 and Judge Cahill's order of June 28, 1984, by August 30, 1985.

4. Discovery in this matter is to be completed not later than January 31, 1986, which shall not be extended unless good cause is shown and the Court so orders.

5. Any and all motions dispositive of claims asserted in this matter shall be filed not later than March 4, 1986.

/s/ George F. Gunn
United States District Judge

Dated: September 3, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., et al.,
Defendants.

ORDER

(Filed: November 8, 1985)

IT IS HEREBY ORDERED that the joint motion of defendants for protective order be and is denied. As this Court reads the January 26, 1984 order of the Honorable David Noce regulating discovery in this case, the Magistrate permitted plaintiffs to request document production beyond the partnerships in which they had actual investment interest to the extent they could demonstrate that production might lead to the discovery of admissible evidence. The Magistrate sought to limit the potentially inexhaustible reach of such discovery by holding plaintiffs to production requests relating to no more than five additional partnerships in which defendants were engaged. This Court reads the Magistrate's order as permitting such discovery into the affairs of five additional partnerships for each defendant. Plaintiffs' counsel has requested production with respect to twelve additional partnerships, giving rise to defendants' motion. In accordance with this Court's interpretation of the Magistrate's ruling, defendants shall produce the requested documents for plaintiffs' inspection.

In response to plaintiffs' Motion to Resolve Issue in Connection with Defendant Shapiro's Claim of Privilege as to Plaintiffs' Motion to Inspect Documents,

IT IS FURTHER ORDERED that defendant Shapiro shall produce the documents as to which privilege is claimed for *in camera* inspection. Defendant shall produce the documents on Friday, November 22, 1985 at 4:00 p.m.

IT IS FURTHER ORDERED that, upon resolution of defendant's claim of privilege, defendant Shapiro shall comply with the order of the Magistrate of January 26, 1984 as adopted by order of Court 4 on June 28, 1984 and by further order of this Court on September 3, 1985.

IT IS FURTHER ORDERED that the motion of plaintiffs for sanctions against defendant Shapiro be and is denied.

IT IS FURTHER ORDERED that the motion of defendant Shapiro for sanctions against plaintiffs be and is denied.

IT IS FURTHER ORDERED that the motion of plaintiffs for sanctions against defendant Harold Rand individually and Harold Rand d/b/a Harold Rand & Co., Public Relations, be and is denied. An entry of appearance as counsel for defendant Rand has only recently been filed. The Court fully expects defendant, now that he is represented by counsel, to comply fully and expeditiously with outstanding discovery orders of this Court.

This case has now been under court-directed discovery for over two years and has generated volumes of motion papers that have yielded a minimum amount of discovery material. The lack of cooperation among the parties has taxed the resources of clients, the patience of counsel, and the time of the Court. The Court admonishes counsel, not for the first time, to seek to effectuate the spirit of Local Rule 7(c) and strive to resolve discovery disputes independently. The Court further reminds counsel of the discovery deadline of January 31, 1986. This case is set for trial March 17, 1986, and the Court fully expects to try it at that time.

Dated this 8th day of November, 1985.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C

Court No. 6

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

(Received: November 22, 1985)

Come now the Plaintiffs and, by leave previously granted by order of this Court, amend by interlineation the First Amended Complaint as follows:

1. Delete paragraph 2 of Count XV and substitute in lieu thereof the following:

> 2. Each and every Defendant individually, and with others who are presently not fully known, as set out in Count II is an enterprise within the meaning and definition thereof in 18 U.S.C.A. Sec. 1961(4) that has an existence directed through an economic goal that can be defined apart from the commission of the predicate acts (hereinafter set out) constituting the "Pattern of racketeering activity."

2. Delete paragraph 3 of Count XV and substitute in lieu thereof the following:

> 3. That each said enterprise as set out in Paragraph (2) above exists separately from the persons or entities liable under the RICO claims; each such enterprise also having other purposes, the full extent of which are still unknown to Plaintiffs.

3. Delete paragraph 4 of Count XV and substitute in lieu thereof the following:

> 4. Alternatively to Paragraphs (2) and (3) above, Plaintiffs state that Defendants, with certain others who are not presently known at this time, herein formed an association in fact constituting an enterprise as defined in 18 U.S.C.A. § 1961(4), a purpose of which was the organization and formation of business entities, including motion picture Limited Parnterships and selling interest therein to the Public as investments and tax shelters, which enterprise was separate and distinct from the predicate acts of racketeering activity alleged herein; said enterprise also being separate from the persons and entities liable under the RICO claims herein, said enterprise also having other purposes, the full extent of which are still unknown to Plaintiffs."

LUPO & STEMMLER

/s/ David G. Lupo #15067
Attorney for Plaintiffs
818 Olive Street, Suite 1240
St. Louis, Missouri 63101
(314) 436-4130

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

ORDER

(Filed: December 19, 1985)

IT IS HEREBY ORDERED that plaintiffs' motion for continuance of trial setting beyond March 17, 1986 and extension of time for discovery beyond January 31, 1986 be and is denied.

IT IS FURTHER ORDERED that the order of Magistrate Kingsland entered November 27, 1985 imposing sanctions on plaintiffs for failure to appear at noticed depositions and for requiring the appearance of defendants' counsel at an unscheduled hearing be and is affirmed.

In their motion plaintiffs make further request for a hearing on their motion for protective order. It is the judgment of this Court that plaintiffs' motion for a protective order was considered in the context of the complete discovery schedule worked out by Magistrate Kingsland and was thereby mooted.

Dated this 19th day of December, 1985.

/s/ illegible
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

ORDER

(Filed: December 20, 1985)

The defendants have filed a joint motion to compel answers to deposition questions regarding the basis of plaintiffs' claims. Judge Kingsland, in an in-chambers conference with Mr. Lupo, Mr. Horgon and Mr. Alber, instructed plaintiffs that they are to answer questions that inquire into the facts underlying the plaintiffs' complaint. In accordance with Judge Kingsland's order of December 18, 1985, in chambers, this court, upon request of the defendants, hereby appoints a special master, at plaintiffs' cost, to oversee the remainder of the depositions, as it is deemed necessary by the parties and the special master. *See Fed.R.Civ.P.* 53.

In view of the history of the discovery proceedings in this case, it is the opinion of this court that the ends of justice compel the appointment of a special master to preside over all pending and future dispositions in this case, lest there be a repetition of the obstructive tactics or further delay, waste, expense or more needless burdens to cast upon this court. *Shapiro v. Freeman,* 38 F.R.D. 308 at 312 (S.D. N.Y. 1965).

IT IS THEREFORE ORDERED that the Honorable Lackland H. Bloom, a retired judge from the Missouri State 22nd Judicial Circuit, serve as special master and shall have full

power to designate the time and place of all pending and future depositions in this case and to rule on all pending and future objections at the depositions. *Shapiro v. Freeman, supra* at 312. The fees and expenses of the special master shall not be charged as costs of the action; rather they shall be fixed by the court upon the special master filing at the conclusion of his services a report of time expended and shall be paid by plaintiffs' attorneys without reimbursement from their clients. *See Bardin v. Mondon,* 298 F.2d 235 (2nd Cir. 1961).

Any action taken or ruling made by the special master shall be subject to review by this court upon the application of any parties aggrieved by such action or ruling, provided only that such application be made within three days after the action or ruling of which complaint is made.

The party seeking review shall, at his or her own expense, provide to the court a transcipt of the proceedings before the master, if a court reporter was present, together with a concise statement of the issues and the contentions with respect thereto and points and authorities.

On any matter brought to the court for review, the master shall furnish to the court a statement of the problem and the reasons for his action, which statement may include the legal basis for his action.

When review is sought as to a matter arising in the deposition, the master may, in his discretion, order completion of the deposition pending review.

This appointment of a special master to preside over depositions in this case in no way alters the previously set deadline for discovery of January 31, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

Dated: December 20, 1985

BASTIEN, et al. vs. R. ROWLAND, et al.

Depositions Actually Taken and Dates

Depositions Actually Taken	Date	Taken By	Location
Robert Rust	09/27/83	Plaintiff	St. Louis
Mike Kickham	11/16/83	Defendant	St. Louis
Robert Rust	12/11/85	Plaintiff	St. Louis
R. Rowland	12/12/85	Plaintiff	St. Louis
Mike Kickham (2nd time)	12/13/85	Defendant	St. Louis
Arla Reed	12/16/85	Defendant	St. Louis
Ronald Burt	12/17/85	Defendant	St. Louis
Lou Werner	12/18/85	Defendant	St. Louis
Arthur O'Hare	01/22/86	Defendant	St. Louis
Jack Bastien	01/23/86	Defendant	St. Louis
Tom Yeager	01/24/86	Defendant	St. Louis
Nile Farnsworth	01/27/86	Defendant	St. Louis
Mike Kickham (3rd time)	01/29/86	Defendant	St. Louis
Lou Werner (2nd time)	01/29/86	Defendant	St. Louis
Ronald Burt (2nd time)	01/30/86	Defendant	St. Louis
Arthur O'Hare (2nd time)	01/30/86	Defendant	St. Louis
Jane Tschudy	01/31/86	Defendant	St. Louis
Robert Krieg	02/03/86	Defendant	St. Louis
James Nolan	02/03/86	Defendant	St. Louis
David Wells	02/05/86	Plaintiff	St. Louis
Jack N. Ross	02/05/86	Plaintiff	St. Louis
James K. McAtee	02/05/86	Plaintiff	St. Louis
Robert Tschudy	02/06/86	Defendant	St. Louis
Vernon Kluge	02/06/86	Defendant	St. Louis
Granville Mitchell	02/07/86	Defendant	St. Louis
Harold Rand	02/10/86	Plaintiff	New York

Stanley Levine	02/10/86	Plaintiff	New York
Ted Shapiro	02/11/86	Plaintiff	New York
Irving Cohen	02/11/86	Plaintiff	New York
Stanley Levine	02/12/86	Plaintiff	New York
Pola Harris-Moore, Cinema-shares, Interna-tional Television	02/12/86	Plaintiff	New York
Herman Schwartzman	02/13/86	Plaintiff	New York
Howard Jacobs	02/13/86	Plaintiff	New York
Ed Fingerman	02/14/86	Plaintiff	New York
Howard Mann	02/14/86	Plaintiff	New York
Bernard Troy	02/14/86	Plaintiff	New York
Art Greenfield, distributor	02/18/86	Plaintiff	California
Shelly Presser, Atty. and officer, Warner Bros. Inc.	02/18/86	Plaintiff	California
Eli Boyer	02/19/86	Plaintiff	California
Morrie Engle	02/19/86	Plaintiff	California
Marla Muse (Copyright Office)	02/21/86	Plaintiff	Washington, D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

ORDER

(Filed: March 12, 1986)

IT IS HEREBY ORDERED that the petition for allowance of compensation and expenses filed by the Honorable Lackland H. Bloom, appointed as Special Master in this case, be and is accepted as submitted to the Court. Plaintiffs shall pay Judge Bloom $10,338.72 as reasonable compensation for his time and expenses in serving the Court in accordance with the order of December 20, 1985 of this Court.

Dated this 12th day of March, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

ORDER AND MEMORANDUM

(Filed: March 13, 1986)

IT IS HEREBY ORDERED that the motion of defendants Harold Rand and Harold Rand Public Relations for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendant Laventhol & Horwath for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants R. Rowland & Co., Raymond E. Rowland, Jr. and Robert Rust for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants Weiss, Rosenthal, Heller, Schwartzmann, et al. for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants Irving Cohen, Stanley Levine, Irving Cohen & Associates, Inc., ICA Productions Corp., Ted Shapiro, and the Astor Group for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of these defendants to dismiss Count I of plaintiffs' complaint (RICO) be and is denied.

IT IS FURTHER ORDERED that the motion of these defendants to sever be and is denied.

This case arises out of the sale and purchase of limited partnership interests in a number of motion picture distributorships in 1975-76. Plaintiffs, who invested in five separate limited partnerships organized by defendants Cohen, Shapiro, Preston, Rand and Davis as tax shelters, seek to recover for damages suffered as a result of alleged misrepresentations and omissions by defendants. Plaintiffs seek recovery under Rule 10b-5, promulgated under the Securities and Exchange Act of 1934, common law fraud, conversion and breach of fiduciary duty. In September 1985 plaintiffs amended their complaint to add a count under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* (1985). Also named as defendants in this action are the brokers through whom plaintiffs purchased their interests, the Rowland defendants; the accountants alleged to have reviewed the accounts of the partnerships at issue, Laventhol & Horwath; the attorneys responsible for preparing the offering memoranda in conjunction with the private placement sale of the limited partnership interests, Weiss, Rosenthal, Heller, Schwartzmann, et al.; and the initial limited partner of two of the limited partnerships, Stanley Levine. At the core of plaintiffs' complaint is an allegation of a broad-based conspiracy among the defendants to defraud plaintiffs of their investments through an interlocking system of limited partnerships structured to render a profit to defendants and to circumvent the registration requirements of the Securities Act of 1933.

This case was filed in March 1982 and developed major discovery problems almost immediately. The ensuing four years have been taken up largely in battling over the appropriate scope and order of discovery, a process that, before it was forced to conclusion by order of this Court on February 19, 1986, demanded the attention of four District Court Judges, two United States Magistrates and a retired St. Louis Circuit Judge appointed as Special Master to schedule and supervise depositions. The parties have petitioned the Eighth Circuit for extraordinary relief on three separate occasions. Although the

discovery deadline has passed, motions and objections continue to trickle into Court, consuming time and energy of counsel and Court that should now be directed toward trial.

Defendants have now filed motions for summary judgment on plaintiffs' complaint, arguing that after four years of discovery efforts plaintiffs have failed to come forward with any credible evidence in support of their claims. *See Fontenot v. Upjohn Co.*, ____ F.2d ____, No. 85-4201, slip op. (5th Cir. Jan. 17, 1986) (summary judgment appropriate where the party bearing the burden of proof fails to produce evidence in support of its claim).

As an initial matter, the Court notes that defendants filed their motions on March 4, 1986, less than two weeks before trial and well past the deadline prescribed by Local Rule 7(H) (dispositive motions not accepted later than 30 days in advance of trial except for good cause shown). Plaintiffs, burdened with trial preparation, have scarcely had an adequate amount of time to respond. For this reason alone the Court finds denial of defendants' motions appropriate.

Furthermore, the Court finds that genuine issues of material fact remain, making summary judgment an inappropriate remedy in this case *Buller v. Buechler,* 706 F.2d 844, 846 (8th Cir. 1983). As plaintiffs' case will be tried in its entirety, the allegations of conspiracy among the defendants defeat the arguments of Irving Cohen, et al. in support of severance of actions. Plaintiffs will be provided the opportunity to present their complete case to the jury in a single trial to commence as scheduled seven months ago.

Dated this 13th day of March, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

COURTROOM MINUTE SHEET — CIVIL — CRIMINAL

Filed: March 31, 1986

Case No. 82-950(C)(6) Bastien, et al.

vs.

Rowland & Co., et al.

Judge: Gunn Court Reporter: Lynne Shrum

Attorney( ) for Pltff(s): James Stemmler

Attorney(s) for Deft(s): Michael Clear, et al.
Alan Kohn (was not present)

(✓) Parties present for hearing on: Motions for Summary Judgment

(✓) Court grants Motions for Summary Judgment in favor of Defts. Order to be entered forthwith. (G.F.G.)

Attorney present: See Above Deputy Clerk: B. Kramer

Proceeding Commenced: 9:20 a.m. Concluded: 10:00 a.m.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

MEMORANDUM AND ORDER

(Filed: April 17, 1986)

IT IS HEREBY ORDERED that the motions of defendants for summary judgment be and are granted.

This Court granted summary judgment in favor of defendants on all counts of plaintiffs' complaint at the conclusion of a hearing held March 31, 1986 at 9:00 a.m. in open court. The Court files this memorandum to state the basis for its ruling from the bench.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs in this case are eight wealthy individuals. At various times in 1975 and 1976, they purchased through R. Rowland & Co., a St. Louis securities broker, limited partner-

ship interests in five limited partnerships[1] organized for the purpose of buying and distributing motion pictures. Motion picture distribution is a high-risk enterprise, and for this reason plaintiffs were, through offering memoranda made available to them prior to the time of their investment, counselled to purchase limited partnership interests only if they could afford a total loss of their investment. *See* Offering Memorandum of Antares Associates,[2] submitted as Exhibit B to the motion of the Rowland defendants for summary judgment, p. ii.

Under the United States tax laws controlling at the time of plaintiffs' purchases, however, investment in motion picture limited partnerships was a recognized legal means of sheltering income from taxation. It was at that time possible for investors in these partnerships to take deductions greatly in excess of their

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[1] The five limited partnerships in which plaintiffs purchased interests are identified below, along with the amount invested by each plaintiff:

Jack D. Bastien	Antares Associates	$12,000	¼
Michael J. Kickham	Alpine Associates	$22,500	½
Arthur F. O'Hare	Antares Associates	$12,000	¼
Arla E. Reed	Somerset Associates	$24,000	1
Jane E. Tschudy	Antares Associates	$12,000	¼
E. Louis Werner	Alpine Associates	$45,000	1
	Avalon Associates	$30,000	1
Thomas W. Yager	Cypress Associates	$13,000	¼
Ronald B. Burt	Somerset Associates	$24,000	1

See Plaintiffs' Exhibit A attached to original complaint.

In addition to these five limited partnerships, the allegations in plaintiffs' complaint touched on numerous others organized by the same parties for the same purposes. The additional partnerships proved the source of extensive discovery disputes discussed more fully in the body of this memorandum.

[2] The offering memoranda of the five limited partnerships involved in this case are substantially similar. Hence the Court will refer throughout to the Antares memorandum in support of its judgment with respect to all five partnerships.

actual investment in the partnerships, and the chief return anticipated by these plaintiff-investors was a substantial tax benefit.[3]

Prior to purchasing interest in the limited partnerships at issue, plaintiffs were required to complete "Investor Questionnaires" representing that each had a net worth in excess of $200,000 and that some portion of the gross annual income of each was taxable at a rate of 50% or higher. *See* Investor Questionnaires, submitted as Exhibit A to the motion of the Rowland defendants for summary judgment. Upon completion of this questionnaire, each plaintiff received a confidential offering memorandum covering the partnership in which he or she was investing. These memoranda prominently identifed the securities involved as "high risk" investments. The memoranda emphasized the potential tax advantages flowing from the investments but fully disclosed that the benefits were contingent upon the then-operative tax laws remaining in effect. The memoranda further disclosed that the United States Congress had given consideration to the elimination of tax shelter benefits for holders of motion picture limited partnership interests. *See* offering memorandum at 3-15; 39-55.

In 1976 Congress acted to eradicate the favorable tax treatment extended to these interests. The Tax Reform Act of 1976 limited the allowable deduction for motion picture limited partnerships to the amount an individual investor had actually placed "at risk" — that is, to the amount of each plaintiff's investment.

Plaintiff-investors in the Alpine and Somerset partnerships were notified of this change in September 1976 by letter from Irving Cohen, general partner of those two partnerships. *See* letters of Irving Cohen to plaintiffs Werner, Kickham and Reed,

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[3] It appears from the record, for example, that plaintiff Bastien took a deduction of $50,746 for his $12,500 investment while plaintiff Werner deducted $230,583 for his investment of $75,000.

submitted as Exhibit A to the motion of defendant Cohen for summary judgment. Defendant Cohen particularly alerted plaintiffs to the retroactive effect of the legislation.

Plaintiffs in all cases claimed pre-1976 Reform Act deductions for 1975 and 1976 and in some cases for subsequent years. The Internal Revenue Service challenged the deductions taken by plaintiffs and ultimately required them to pay back taxes and penalties for the deductions disallowed under the 1976 Act. The IRS permitted full deductions to cover plaintiffs' "at risk" investments. By 1978 all plaintiffs realized that their investments in the partnerships at issue in this case would not shelter their income. Additionally, the partnerships proved to be unprofitable. None of the movies owned by the partnerships enjoyed any kind of commercial success, and plaintiffs received no return on the capital they invested.

Plaintiffs filed suit in this Court on June 15, 1982.[4] In their original fifteen count complaint[5] plaintiffs alleged that defendants had defrauded them of their investment capital by organizing the limited partnerships in such a way that the partnerships would yield benefits to the general partners without returning a profit to the limited partner investors. Plaintiffs alleged, *inter alia,* that defendants effected the sale of the limited partnership interests by deliberately misrepresenting the tax benefits to accrue to plaintiffs, knowing the partnerships were not valid tax shelters; that the offering memoranda contained material misrepresentations and omissions concerning

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[4] This case was originally assigned to Court 2. In January 1983 it was reassigned to Court C, whence, in June 1983, it was reassigned to Court 4. In May 1985 it was reassigned to Court 6. Along the way the case has been three times referred to United States Magistrates and has been the subject of three petitions to the Eighth Circuit for extraordinary relief.

[5] Plaintiffs' original complaint actually comprised only twelve counts, since Counts I-III consisted solely of factual allegations and did not contain a prayer for relief.

the cost to the partnerships of procuring the motion pictures and the method of payment for them; that defendant R. Rowland & Co. failed to perform due diligence with respect to the partnerships and failed to make full disclosure of the rate of commission it was receiving in its sales of limited partnership interests; that the defendants were involved in a national interlocking scheme to defraud investors; and that all the partnerships, along with unnamed and unnumbered others, were part of a mammoth securities offering, organized as individual partnerships so as to circumvent the registration and disclosure requirements of the Securities Act of 1933. Plaintiffs' complaint ran against R. Rowland & Co.; the New York law firm of counsel in organizing the limited partnerships, Weiss, Rosenthal, Heller & Schwartzmann; the St. Louis accounting firm alleged to have reviewed partnership accounts, Laventhol & Horwath; the general partners of the five partnerships in which plaintiffs invested, Richard W.A. Davis, Harold Rand, Irving Cohen, Joel Preston and Ted Shapiro; and the original limited partner of two of the partnerships, Stanley Levine. The complaint sought recovery under Rule 10b-5 promulgated under the Securities Exchange Act of 1934, common law fraud, breach of fiduciary duty, conversion and the Missouri Uniform Securities Act.

All defendants filed motions to dismiss on the ground that plaintiffs' complaint was barred on each count by the applicable statute of limitations. On February 25, 1983, Judge Meredith denied defendants' motions with respect to all counts other than Count XV arising under the Missouri Uniform Securities Act. Because plaintiffs had alleged concealment of the fraud by defendants so as to toll the running of the statute of limitations,[6] which raised a factual issue to be assumed in favor of plaintiffs at that stage in the proceedings, the Court conclud-

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[6] Judge Meredith found the limitations period applicable to plaintiffs' complaint to be two years on all surviving counts. *See* Order of Court C dated February 25, 1983.

ed that dismissal of the complaint was not appropriate. Since, however, the equitable tolling doctrine was not available to suspend the running of the statute of limitations on the Missouri securities law claim, the Court dismissed Count XV. *See* Order of Court C dated February 25, 1983. Defendants thereafter filed answers denying every allegation of wrongdoing in plaintiffs' complaint.

The history of this case from the time it could be said to have been at issue is tortured. Disputes over discovery arose immediately, foreshadowing a three year battle over the scope and priority of discovery. The essential conflict between plaintiffs and defendants persisted through court hearings, Local Rule 7(c) conferences and referrals to magistrates. Defendants took the position from the outset that plaintiffs' claims had no merit and that discovery should be held to the five partnerships in which plaintiffs invested. Plaintiffs stood by their broader allegations of a national fraudulent scheme involving many more parties than had been named in the original suit, whose identities would only become clear in the course of discovery.[7]

The Court sought to resolve this fundamental conflict between the parties by referring the case to the Honorable David Noce, United States Magistrate, for clarification and resolution of discovery disputes. Judge Noce conducted two separate hearings on discovery and issued orders ruling on the proper scope and order of further discovery in the case. Judge Noce's orders prompted two separate petitions to the Eighth Circuit for extraordinary relief, the first by plaintiffs protesting that the scope had been set too narrowly, the second by defendants protesting that the scope was over-broad. The Eighth Circuit denied both petitions.

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[7] Plaintiffs' first action in this case was the filing of a motion to have this matter declared complex litigation. This motion was accompanied by a motion for a protective order to shield plaintiffs from the obligation of revealing the theory of their case "prematurely." Both motions were denied by order of Judge Noce on September 14, 1983.

The Court involvement in the discovery process did not eliminate the difficulties. Plaintiffs persisted in their efforts to discover documents beyond the scope of the Magistrate's order. Defendants continued to object to plaintiffs' requests and to insist that plaintiffs submit to discovery requests to reveal the facts upon which their claims were based. By the time this Court inherited this case the file had grown to eight volumes, six of which contained primarily motions to compel and objections thereto.

The parties to this action met with this Court in chambers on July 31, 1985 with the purpose of entering into a stipulated agreement to complete discovery and move the case to trial. Plaintiffs submitted a proposed order to the Court. The stipulated agreement required that document production be completed in accordance with Judge Noce's order by August 31, 1985; that depositions would proceed thereafter; that all discovery would be complete by January 31, 1986; that dispositive motions would be filed by March 4, 1986; and that the case would proceed to trial on March 17, 1986. Plaintiffs' counsel informed the Court that he expected to take about two months in the presentation of plaintiffs' case.

This conference left the Court with the firm belief that the greatest interests of justice would be served by pushing this case, still in the early stages of preparation after three years, to trial. With that end in view the Court began to arrange its docket to assure that a minimum two month block of time would remain open beginning March 17, 1986. When, following the conference, a new flurry of discovery motions was forthcoming, threatening to reduce the litigation yet again to a battle of unproductive motion papers, the Court referred all discovery matters to the Honorable Robert Kingsland, United States Magistrate, for supervision and control.

Judge Kingsland took jurisdiction of the case on November 18, 1985 and immediately set a hearing to resolve outstanding disputes and arrange a schedule for depositions. When dif-

ficulties arose in the first scheduled depositions, the Court appointed a special master to oversee all future depositions. Although the schedule set was intensive, it appeared that discovery would be completed according to the parties' stipulated agreement.

On December 18, 1985, in the course of a hearing before Judge Kingsland, plaintiffs' counsel became ill. After reviewing the history of the case and giving consideration to the resources expended on the matter in the foregoing two months, the Court determined that the case should go forward as scheduled. This decision of the Court prompted a third petition by plaintiffs to the Eighth Circuit, which stayed discovery pending a hearing on writ of mandamus. After oral argument held January 14, 1986 the Eighth Circuit denied the writ and ordered an extension of the discovery cut-off date until February 19, 1986.

Discovery thereafter resumed on an intensive schedule involving daily depositions conducted in New York and Los Angeles as well as St. Louis under the supervision of a special master. Problems persisted, and plaintiffs protested that the schedule did not permit them proper preparation. The Court refused to continue the case.

On March 4, 1986 all defendants filed motions for summary judgment in accordance with the stipulated order. The gist of each motion was that plaintiffs had failed to come forward with any evidence of any fact that would support their claims. With their motions defendants filed substantial supporting documents tending to disprove plaintiffs' allegations. Nonetheless, in view of the extreme circumstances surrounding the final pre-trial stage of the case, the Court denied defendants' motions on March 14th. *See* Order of this Court dated March 14, 1986.

At the opening of trial on March 17th, prior to the commencement of voir dire, the Court announced that on reconsideration of defendants' motions it would vacate its March 14th order. The plaintiffs were then on notice as they com-

menced their case that the Court had once again taken defendants' motions under advisement. Defendants then formally renewed their motions on the record. Since the essence of defendants' motions lay in plaintiffs' failure to produce any evidence in support of their claims, the Court admonished plaintiffs to come forward at the outset of trial with *anything* that would satisfy the Rule 56(e) burden on a nonmoving party on motion for summary judgment.

Trial proceeded for three-and-a-half days, during which time plaintiffs completed the direct examination of one witness. At that point the Court recessed the action. Plaintiffs were granted an additional ten days to file materials in opposition to defendants' motions prior to a hearing on March 31st. At the hearing plaintiffs argued fervently for their legal theories but once again failed to come forward with any evidence that supported any underlying fact of their complaint. The Court therefore granted defendants' motions from the bench.

DISCUSSION

Summary judgment is an extreme remedy, ordinarily available only to a movant who "has established his right to judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances." *Greco v. ABC Transnational Corp.*, 623 F.Supp. 104, 105 (E.D. Mo. 1985), citing *Steel v. Armour Co.*, 583 F.2d 393 (8th Cir. 1978). The burden of proof is on the moving party, and the Court should not grant summary judgment unless it is convinced that there is no evidence to sustain a recovery under any circumstances. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The party opposing a motion for summary judgment, however, cannot rest upon the mere allegations of his pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See generally* 10A Wright & Miller *Federal Practice & Procedure* § 2739 (1985). Where the nonmoving party fails to meet this obligation, summary judgment serves a "salutory pur-

pose in avoiding a useless, expensive, and time consuming trial where there is no genuine, material fact to be tried." *Steel, supra.*

It is the judgment of this Court that plaintiffs have failed to meet the burden placed upon them by defendants' motions. After hearing plaintiffs' evidence at trial and reviewing the documents submitted in opposition to defendants' motions, the Court concludes that plaintiffs are without evidence to support any of the factual allegations of their complaint, and that a two month trial would involve the parties and the Court in needless — if not abusive — delay and expense. *See Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986).[1]

The sole piece of evidence plaintiffs have submitted that tends to support any of their allegations is the affidavit of Frank Johnson, obtained after trial of the case had already begun, in which the affiant states from personal knowledge that defendant W.A. Davis paid considerably less for certain foreign films purchased in 1975 than the price at which the films were entered in the account books of the partnership for which they were

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[1] The crucial question for the court is whether there is a "genuine issue" of fact concerning any essential element of the claim on which judgment is being sought. If the moving party can show that there is no evidence whatever to establish one or more essential elements of a claim on which the opposing party has the burden of proof, trial would be a bootless exercise, fated for an inevitable result but at continued expense for the parties, the preemption of a trial date that might have been used for other litigants waiting impatiently in the judical queue, and a burden on the court and the taxpayers. Aside from counsel's fees, which this court has frequently fixed at rates of $100 per hour or more, a Rand Corporation study has estimated the public cost of the average jury trial in federal court to be over $7000. [footnote omitted] Hence, every hour of litigation is costly both to the parties and the taxpayers, and the expense should not be incurred needlessly.

Fontenot v. Upjohn Co., 780 F.2d 1190, 1195 (5th Cir. 1986).

purchased. This single affidavit does not only represent a meager evidentiary challenge to the substantial array of documents assembled by defendants directly disproving the allegations on which plaintiffs seek to go forward: the affidavit contains no attestations of any facts at issue in this case. The business negotiations as to which Mr. Johnson claims personal knowledge did not involve any of the partnerships in which plaintiffs invested and hence do not substantially support any allegations concerning those partnerships. Mr. Johnson attests to negotiations solely with defendant Davis, and in no way implicates the other named defendants to this action. Further, Mr. Johnson's averments with respect to the rates of commission demanded by R. Rowland & Co. do not tend to establish any wrongdoing by that defendant, as they fall within the amounts disclosed in the offering memorandum as having been allocated to finders' fees, brokers' commissions and comparable disbursements.

With respect to plaintiffs' specific claims, this Court finds that plaintiffs have failed to come forward with any evidence supporting essential elements of each cause of action. Thus, defendants are entitled to judgment as a matter of law. *Fontenot, supra.*

Plaintiffs have submitted no evidence that would support a finding of fraudulent misrepresentation by any defendant.[9] In fact, the extensive testimony of defendant Hermann Schwartzmann tended substantially to demonstrate that the offering memoranda distributed to plaintiffs prior to their investments made exhaustive disclosure of the partnership organization and risk factors. Material misrepresentation is an essential element of both 10b-5 and common law fraud.

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[9] As indicated above, the affidavit of Frank Johnson does not contain averments concerning any partnership in which any plaintiff invested.

Defendants through deposition testimony of plaintiffs established that none of the plaintiffs had in any case relied upon the offering memoranda or, by implication, any alleged misrepresentations included therein. Defendants thereby disproved an essential element of both 10b-5 and common law fraud. In lieu of submitting any evidence of reliance to counter defendants' proof, plaintiffs argued extensively that the instant case should be regarded as an omissions case, in which reliance should be presumed. *See Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972). The Eighth Circuit has held that the *Affiliated Ute* rule does not extend to cases in which omissions are alleged in a document, reasoning that in such a case there is no need to presume reliance. *Vervaecke v. Chiles, Heider & Co.,* 578 F.2d 713 (8th Cir. 1978). Plaintiffs have therefore failed to come forward with evidence on an essential element of their claims under 10b-5 and common law fraud.

Plaintiffs do not indicate that they have evidence in support of their allegations of breach of fiduciary duty or theories of racketeering activity.

Judge Meredith in 1983 declined to dismiss plaintiffs' complaint solely on the ground that plaintiffs had pleaded fraudulent concealment. Three years later plaintiffs are without anything to support that pleading. Without proof of such concealment, all of plaintiffs' claims are barred by the statute of limitations. Plaintiffs have submitted excerpts of depositions indicating that they did not suspect the fraud until they discussed these investments with Don Doerge, a former broker with R. Rowland & Co., in 1980. This testimony does not satisfy plaintiffs' burden on the issue of fraudulent concealment. The vast amounts of discovery materials contain no evidence of active conduct by defendants subsequent to the alleged wrongdoing that precluded earlier discovery of the claims. *See Hasenyager v. Board of Police Commissioners,* 606 S.W.2d 468, 472 (Mo.App. 1980).

Upon critical review of the file in this case and the history of its growth, this Court regrets the profligation which the case represents. *See Jaquette v. Black Hawk County, Iowa,* 710 F.2d 455 (8th Cir. 1983). An inordinate amount of court time has been devoted to this case, both at the trial and appellate levels. The Court has been extensively and unusually involved in the discovery process, although this involvement does not seem in any way to have smoothed the matter's progression to trial. Preparation of the case has also been at extraordinary expense to the parties.[10]

Throughout the course of this litigation defendants have raised serious challenges to the submissibility of plaintiffs' case, beginning with objections to the suit as time-barred, proceeding through protestations of complete ignorance of any facts to support the claim, and concluding with motions for summary judgment asserting in substantial terms that plaintiffs are entirely without evidence to support any of their claims. In the face of these challenges and in view of the extreme circumstances under which final preparation for trial was completed, the Court has sought to give plaintiffs every benefit and every opportunity to prove their case. *See* Order of this Court dated March 27, 1986. Plaintiffs were given the benefit of relaxed standards of pleading on their RICO count. They were permitted to file pre-trial materials that failed in almost every particular to comply with the pre-trial order of this Court. They were permitted to proceed to trial without meeting the obligation to respond substantively to defendants' motions for summary judgment. They were permitted to introduce previously unidentified exhibits at trial according to a numbering system understood only by them. The Court permitted this in the interest of providing plaintiffs every opportunity to demonstrate that a trial of this matter was warranted.

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[10] Plaintiffs' counsel filed an affidavit with the Eighth Circuit two weeks before trial averring that the litigation had already cost plaintiffs alone in excess of $197,000, which, the Court is saddened to note, is an amount in excess of the amount of investment capital placed at risk by plaintiffs in 1975 and 1976.

IT IS FURTHER ORDERED that plaintiffs' motion for default judgment against defendant W.A. Davis be and is denied. The general rule with regard to entry of judgment of default against one of several defendants who may be found jointly and severally liable on plaintiffs' claim is set forth in *Frow v. De la Vega,* 82 U.S. 552 (1872). The Supreme Court in *Frow,* reasoning that any other holding could result in inconsistent verdicts, held that entry of judgment against the party in default must await adjudication of liability on the merits with regard to the answering parties. Whatever judgment subsequently entered against those parties would thereafter run against the defaulting party as well. The *Frow* rule has been extended to grant to a defaulting party the benefits of a successful motion to dismiss, *Barnes v. Boyd,* 8 F.Supp. 584 (4th Cir. 1934), *cert. denied,* 294 U.S. 723, aff'd on other grounds, 73 F.2d 910, as well as a successful motion for summary judgment, *Davis v. National Mortgagee Corp.,* 349 F.2d 175 (2d Cir. 1965). The summary judgment in this case therefore accrues to the benefit of defendant Davis as well as to those parties who have actively defended against plaintiffs' claims. Any other results would indeed be inconsistent and unsupportable. *See generally* 10 Wright & Miller *Federal Practice & Procedure* § 2690 (1985).

IT IS FURTHER ORDERED that plaintiffs' motion to strike the pleadings of defendant Preston for failure to attend his deposition be and is denied. For these reasons elaborated above, defendant Preston enjoys the benefit of the summary judgment entered in this case.

IT IS FURTHER ORDERED that plaintiffs' motion for continuance of the trial setting for improper adjournment be and is denied as moot.

Dated this 17th day of April, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C

Court No. 6

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

JOINT APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

(Filed: May 7, 1986)

The defendants in this action respectfully apply to the Court for an award of attorneys' fees and expenses pursuant to Rule 11 of the Federal Rules of Civil Procedure, common law principles governing good faith and fairness in the bringing and conduct of a lawsuit and 28 U.S.C. § 1927.[1]

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[1] The defendants also intend to file their Bill of Costs at the conclusion of plaintiffs' appeal as provided for in Rule 54, F.R.Civ.P. and Rule 24 of the Local Rules of the United States District Court for the Eastern District of Missouri. Local Rule 30 requires that applications for attorneys' fees be made within 21 days after formal entry of judgment, hence defendants are required to apply at this time. However, the Court may reserve determining the amount of attorneys' fees until after the appeal and thereby obviate the necessisty of multiple hearings to determine trial and appellate costs and attorneys' fees. *See Lipsig v. National Student Marketing Corp.*, 78 F.R.D. 726 (D.D.C. 1978, *aff'd* 663 F.2d 178 (D.C. Cir. 1980). Should the Court desire to determine the amount of attorneys' fees prior to appeal, defendants request leave to submit the appropriate affidavits.

A. Introduction

Among what is now a multitude of cases in which attorneys' fees have been awarded for bad faith in the filing and conduct of meritless litigation, there is no case more a model of excess, abuse and heedless waste of Court and attorney resources than this case. Since June 15, 1982, when the action was commenced with a press conference on the Courthouse steps, the plaintiffs have practiced obfuscation and delay with consumate mastery. The record clearly documents it:

* The Court has recorded more than *six hundred* docket entries.

* The defendants have been required to respond to and the Court hear and decide more than *seventy* motions filed by plaintiffs.

* The Eighth Circuit Court of Appeals has *three times* been forced to hear meritless extraordinary writ petitions by plaintiffs, each filed after an order directing plaintiffs to go forward with discovery and each obviously an attempt to forestall the progress of the case.

* Plaintiffs' persistent abuse of discovery required defendants to seek orders at every turn to compel even the most ordinary discovery. Plaintiffs ignored deposition notices, refused even to state whether they would appear for properly noticed depositions, thereby requiring defense counsel to appear unnecessarily, refused to answer questions regarding even the most basic facts, ignored Court orders regarding objections at depositions, failed repeatedly to produce documents and at the same time declined to limit the compass of their own discovery in accordance with the Federal Rules, even after orders of Court requiring them to do so.

* After plaintiffs' documentary discovery was limited by Court order to partnerships arguably related to those in which they invested, they filed a patently frivolous RICO count in an obvious effort to circumvent the Court's order.

* Plaintiffs' failure to notice deponents properly during depositions in New York and California wasted attorney time and travel expense.

* Plaintiffs failed to disclose their expert witnesses for more than a year despite proper interrogatories by defendants requesting that information.

* Plaintiffs repeatedly contested settled issues such as the propriety of trial subpoenas beyond 100 miles and continuance of the trial date.

* Plaintiffs refused to comply with even the most rudimentary pretrial orders. Their witness lists were masterpieces of deception, including hundreds of names of persons they had never even contacted. Plaintiffs refused to supply intelligible exhibit lists or even copies of their exhibits.

* Plaintiffs ignored local rules such as Local Rule 7(c) and the ten page brief limitations, despite objecting to requests for relief from that limit by defendants.

* This Court has been called into session on a least ten different days, three of which were full trial days, and has been harassed by countless letters addressed or copied to the Court's attention.

The list goes on and on, as the Court well knows because of its involvement at every stage of proceedings. Such tactics have been and are grounds in themselves for awards of attorneys' fees, even where an action has some merit (as is explained below). But they are particularly egregious and therefore richly

justify the award of attorneys' fees where, as here, they have been used as a shield to conceal the fact that this case is utterly devoid of substantive merit.

Plaintiffs and their counsel can have no excuse for their commencement and maintenance of this frivolous action. When the time came, after nearly four years, for these plaintiffs to put on their proofs, they had none. When given literally weeks to prepare for and respond to motions for summary judgment, plaintiffs could not summon one sheet of paper or one witness to support their claims. For this, plaintiffs kept defendants under the sword of fraud and racketeering charges for four years, forced the expenditure of hundreds of thousands of dollars in defense and wasted untold hours of Court time.

There is a remedy for such deception and abuse. True, it is reserved for the exceptional case. But this is that case. Defendants submit that the only means to justly remedy the complete lack of good faith manifested by plaintiffs and their counsel and to prevent a repetition of such conduct in future litigations is to award attorneys' fees and expenses. Because plaintiffs' bad faith permeated this case from the first press conference to the very end of the case, defendants respectfully submit that it is proper to require plaintiffs or their counsel to pay all reasonable attorneys' fees and expenses incurred in this case.

B. The Law Amply Supports an Award of Fees and Expenses

1. Rule 11

Rule 11 of the Federal Rules of Civil Procedure states the fundamental standard governing the filing of pleadings in any action:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good

> faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

A leading case in explaining the obligations of Rule 11 is *Eastway Construction Corporation v. City of New York,* 762 F.2d 243 (2d Cir. 1985). In upholding an award of attorneys' fees after entry of summary judgment, the Court explained Rule 11 as follows:

> "The language of the rule, which was amended in 1983, provides a striking contrast to the words of its predecessor. Prior to the 1983 amendment, the rule spoke in plainly subjective terms: An attorneys' certification of a pleading was an assertion that "to the best of his knowlege, information, and belief, there [was] good ground to support it. The rule, therefore, contemplated sanctions only where there was a showing of bad faith, *Nemeroff, supra,* 620 F.2d at 348, and the only proper inquiry was the subjective belief of the attorney at the time the pleading was signed.
>
> The addition of the words "formed after a reasonable inquiry" demand that we revise our inquiry. *See* Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look,* 104 F.R.D. 181 (1985). No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the validity of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.
>
> The notes of the Advisory Committee on Rules appear to support this expanded reading of the rule. The Committee was frank in admitting that, "in practice Rule 11 has

> not been effective in deterring abuses." *See also,* 5 Wright & Miller, *Federal Practices and Procedure:* Civil § 1334 (1971). Thus, the drafters speak of the amended rule as an attempt to "build[] upon and expand[]" the equitable doctrine. To this end, they state, the new language is "intended to reduce the reluctance of courts to impose sanctions . . . *by emphasizing the responsibilities of the attorney*" (emphasis added). Finally, the drafters make absolutely clear that the standard is more stringent than the original good faith formula set forth in *Nemeroff, supra.*
>
> In light of the express intent of the drafters of the new Rule 11, and the clear policy concerns underlying its amendment, we hold that a showing of subjective bad faith is no longer required to trigger the sanctions imposed by the rule. Rather, sanctions shall be imposed against an attorney and/or his client when it appears that a pleading has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

The "objective" standard of *Eastway* has been favorably cited by the Eighth Circuit in upholding a fee award. *See Moore v. City of Des Moines,* 766 F.2d 343 (8th Cir. 1985). *See also Miller v. United States,* No. 84-2698-C(1) (E.D. Mo. March 20, 1985) (Nangle, J.) (Fees awarded as a result of frivolous suit); *Hasty v. Paccar, Inc.,* 583 F.Supp. 1577 (E.D. Mo. 1984) (Nangle, J.) (Court invited Motion for Sanctions where plaintiff in frivolous suit had not made reasonable investigation); *Fisher v. CPC International, Inc.,* 591 F.Supp. 228 (W.D. Mo. 1984) (joint liability imposed on plaintiff and attorney in frivolous suit — suit "had no basis in law from the very beginning"); *See also* e.g. *Di Silvestro v. United States,* 767 F.2d 30 (2d Cir. 1985); *Miller v. Schweickart,* 413 F.Supp. 1059, 1061-62 (S.D.N.Y. 1979); *Rhinehart v. Stauffer,* 638 F.2d 1169, 1171 (9th Cir. 1980).

The requirements to investigate and bring only good faith claims are particularly stringent where, as here, the plaintiffs allege fraud. The courts scrutinize a plaintiff's allegations "to provide assurance that plaintiff has investigated the alleged fraud and reasonably believes that a wrong has occurred." *Richardson v. Whive, Weld & Co.*, [1978] Fed. Sec. L. Rep. (CCH) ¶96-448 at 93,611-2 (S.D.N.Y. 1978). Thus, for example, in *Segal v. Gordon*, 467 F.2d at 602 (2nd Cir. 1982), the Second Circuit dismissed a complaint with conclusory allegations in a shareholder derivative action "obviously filed on the basis of little investigation or research," 467 F.2d at 608, and the court cautioned that, "[a] complaint alleging fraud should be filed only *after* a wrong is reasonably believed to have occurred. . . ." *Id.* at 607-08 (emphasis added). *See also, Lewis v. Varnes*, 368 F.Supp. 45, 47 (S.D.N.Y.), *aff'd on other grounds*, 505 F.2d 785 (2nd Cir. 1974).

The redress for a violation of Rule 11 "may include an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the pleading . . . including a reasonable attorney's fee." Fed.R.Civ.P. 11. And the award of fees and costs may be assessed against the attorney personally, as well as parties, *See Fisher, supra* at 235-37. *See also,* Wright & Miller, *Federal Practice and Procedure,* Civil § 1334 at 111 (1982 Supp.); *Miller v. Schweickart*, 413 F.Supp. 1059 (S.D.N.Y. 1976); *Kinee V. Abraham Lincoln Federal Savings & Loan Ass'n.*, 365 F.Supp. 975 (E.D. Penn. 1973).

Based upon plaintiffs' complete inability to produce evidence of fraud and racketeering and upon their repeated abuses during the litigation it is clear that an award of both attorneys' fees and expenses is appropriate under Rule 11.

2. Good Faith.

As this Court recognized in citing *Jaquette v. Blackhawk County*, 710 F.2d 455 (8th Cir. 1983), the fundamental obligation of good faith which is a prerequisite to use of the courts is

breached where a party engages in "frivolous claims, unnecessary and extended discovery and extended motion practice." *Id.* at 461. Courts have the inherent power to remedy such breaches, quite apart from Rule 11, and may award attorneys' fees, expenses and other appropriate relief. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765-67 (1980); *Hutto v. Finney,* 437 U.S. 678, 689 n. 14 (1978); *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 258-59 (1975); *Doe v. Poelker,* 515 F.2d 541, 547 (8th Cir. 1975) *rev'd on other grounds* 432 U.S. 519 (1977); *Class v. Norton,* 505 F.2d 123, 127 (2d Cir. 1974); *Fisher v. CPC International, Inc., supra.* Even where a claim is filed in good faith (as this case demonstrably was *not*), conduct causing an undue expenditure of court and attorney time justifies taxing attorneys' fees and expenses against the offending parties:

> "[B]ad faith does not require that the legal and factual bases for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy or *mala fides,* the assertion of a colorable claim will not bar the assessment of attorneys' fees against him."

Lipsig v. National Student Marketing Corp., 663 F.2d 178 (D.C. Cir. 1980). It is appropriate under the common law good faith standard, as it is under Rule 11, to tax attorneys' fees and expenses against either the offending party or his attorney, or both. *Jaquette, supra* at 462.

3. 28 U.S.C. § 1927.

The duty to exercise the utmost care and responsibility in initiating and prosecuting a lawsuit is codified and expressly placed on the shoulders of the attorney for a party in 28 U.S.C. § 1927, which provides:

> "Any attorney or person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably

> and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."

Thus, counsel may be assessed fees personally for disregarding the obligation of good faith and unduly multiplying the litigation. In *Limerick v. Greenwald,* 749 F.2d 97 (1st Cir. 1984), the court was faced with counsel who conducted litigation according to the same school as plaintiffs' counsel here:

> "Counsel's course of conduct in the filing of hundreds of pages of irrelevant documents, in citing dozens of cases unrelated to the real issues . . ., in bringing repetitive motions without a shred of rational basis, and in seeking to resurrect matters long since finally concluded has been at least irresponsible and has come perilously close to an abuse of process.
>
> Lawsuits are expensive and time consuming to courts and litigants alike. When an attorney fails to take an objective look at his case . . . he commits a wrong against the courts and against the parties who must respond to his appeal."

Id. at 101. In that case, the court awarded attorneys' fees and expenses. *See also Kiefel v. Las Vegas Hacienda Inc.,* 404 F.2d 1163, 1167 (7th Cir. 1986) and *Jaquette, supra.*

The conduct of plaintiffs' counsel in this case has multiplied the proceedings unconscionably. *Seventy* Motions were filed by plaintiffs, a fact which in itself ought to be dispositive. But an examination of those prolix, repetitive motions is conclusive of the applicability of § 1927. Matters, such as the scope of discovery, the issuance of foreign subpoenas and the trial setting date were raised two, three and four times. Nothing was ever final; no matter, however frivolous or petty, went without a motion.

Defendants respectfully submit that this case is ripe for application of the deterrents envisioned by § 1927 as well as those

arising out of the common law and Rule 11. Certainly, the plaintiffs bear a large responsibility for the conduct of this utterly frivolous litigation and should be compelled to compensate defendants. But plaintiffs' counsel should be forced to acknowledge responsibility as well. All or some portion of the attorneys' fees and expenses assessed against plaintiffs should be payable personally by plaintiffs' counsel.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack D. Bastien, et al.,
Plaintiffs,

v.

R. Rowland & Co., Inc., et al.,
Defendants.

ORDER

(Filed May 8, 1986)

This Court entered an order on December 20, 1985 appointing the Honorable Lackland H. Bloom to serve as a special master in this case. It was ordered, at that time, that the fees and expenses of the special master should be paid by plaintiffs' attorneys, as a sanction, without reimbursement from their clients. This sanction was imposed upon plaintiffs' counsel with the intent to avoid any further dilatory or obstructive tactics by them.

On March 6, 1986, Judge Bloom filed, in accordance with this Court's order of December 20, 1985, a report of expenses incurred and time expended. Judge Bloom informed the Court that he had incurred expenses of $1,938.72 and requested a fee of $75.00 an hour for 112 hours totaling $8,400.00 for fees.

This Court, on March 12, 1986, accepted the petition for allowance of compensation and expenses finding the figures submitted by Judge Bloom to be reasonable. *See Morgan v. Kerrigan,* 530 F.2d 401 (1st Cir. 1976), *cert. denied, McDonough v. Morgan,* 426 U.S. 935 (1976). Plaintiffs' counsel thereafter filed a motion to set aside sanctions or stay payment until there is a final judgment. In light of that motion,

IT IS HEREBY ORDERED, in accordance with this Court's sanction order of December 20, 1985, that plaintiffs' counsel pay Judge Bloom his expenses of $1,938.72 on or before May 16, 1986 and pay to Judge Bloom $8,400.00, for his fee, within ten days of final judgment by the Court of Appeals.

Dated this 8th day of May, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

ORDER

(Filed: May 27, 1986)

In response to plaintiffs' motion to clarify filed with this Court on May 9, 1986, the Court enters the following clarification:

The oral order of November 27, 1985 of the Honorable Robert D. Kingsland, United States Magistrate, sustained by order of this Court entered December 19, 1985, imposed upon plaintiffs' counsel the costs incurred by defendants in attending scheduled depositions at which plaintiffs, on advice of counsel, failed to appear. In the same order, Judge Kingsland imposed on plaintiffs' counsel the prospective costs of a special master appointed to supervise remaining depositions in the case. These costs were imposed on plaintiffs' counsel as a sanction for perceived obstructionist tactics to which plaintiffs' counsel was resorting in the discovery phase of the above-styled action. It has been the understanding of the Court throughout that these sanctions ran against counsel rather than plaintiffs personally. To the extent that language in prior orders led to confusion on this point, this order should clarify the issue.

Payment of the $1,938.72 in expenses submitted to the Court by the Honorable Lackland H. Bloom, Special Master, was stayed by order of May 8, 1986 until May 16, 1986. This date

having passed, the stay is no longer in effect. Accordingly, plaintiffs' counsel is hereby ordered to make payment to Judge Bloom in compliance with the order of this Court of May 8, 1986.

Dated this 27th day of May, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1519

Appeal from the United States District Court
for the Eastern District of Missouri.

Jack D. Bastien, Arthur F. O'Hare, Jane S. Tschudy, E. Louis Werner, Jr., Michael J. Kickham, Arla E. Reed, Thomas W. Yager and Ronald B. Burt,

Appellants,

v.

R. Rowland and Company, a Missouri Corporation, Joseph G. Wohl, Carol Wohl and David Weiss, Executors, Irwin M. Rosenthal, Jacob W. Heller, Herman Schwartzman, Leonard I. Weinstock, Marcel Shwergold and Elkan Abramowitz, Howard L. Mann, E. Cooke Rand, Howard S. Jacobs, R. Mitchell Mass, Edward Fingerman, Weiss Rosenthal, Heller & Schwartzman, a dissolved legal partnership, Laventhol & Horwath, an accounting partnership, Richard W. A. Davis, Richard W.A. Davis, as Trustee for Richard W.A. Davis, Ind., a dissolved Florida corporation, Harold Rand, Harold Rand, d/b/a Harold Rand & Company Public Relations, Joel Preston, Irving Cohen, d/b/a The Astor Group, Ltd., I.C.A. Productions, Inc., a dissolved New York corporation, Stanley Levine, Ted Shapiro, Ted Shapiro, d/b/a The Astor Group, Ltd., Raymond E. Rowland, Jr., Robert R. Rust,

Appellees.

Submitted: February 9, 1987

Filed: March 25, 1987

Before ROSS, BOWMAN, and MAGILL, Circuit Judges.

PER CURIAM.

Jack D. Bastien, et al. ("Bastien") appeal the district court's[1] order of summary judgment in favor of R. Rowland and Co., Inc., et al. ("Rowland") in this action for securities fraud, common law fraud, conversion, breach of fiduciary relationship and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1982 & Supp. II 1984). For reversal, Bastien asserts various errors in the district court's orders regarding discovery, the denial of a continuance and the entry of summary judgment.

The costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter. In 1975 and 1976, Bastien purchased through R. Rowland and Co., Inc., a St. Louis securities broker, interests in five limited partnerships organized for the purpose of buying and distributing motion pictures. Prior to purchase, each investor was informed in writing that the securities were "high risk" investments, and that any potential tax benefits flowing from the investments were contingent upon the then-operative tax laws remaining in effect.

At the time of the sale of the limited partnership interests, federal tax law permitted investors in such partnerships to take deductions for depreciation and investment credit in excess of

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[1] The Honorable George F. Gunn, United States District Judge for the Eastern District of Missouri.

the amount of their investment. The Tax Reform Act of 1976 limited the allowable deduction for motion picture limited partnerships to the initial amount of investments, however. The change in the tax law meant that Bastien could not use the limited partnership investment to shelter income as anticipated at the time of purchase and, because the motion pictures were not profitable, Bastien received no return of capital on the investment. More than six years later, in June 1982, Bastien filed suit in the district court.

After nearly four years of discovery, which culminated in the imposition of sanctions against Bastien's attorneys for obstructing discovery and the appointment of a special master to prevent further abuses, Rowland moved for summary judgment on March 4, 1986. On March 31, the district court granted these motions, reasoning that Bastien failed to produce any evidence of material misrepresentation or other wrongdoing by Rowland.

Summary judgment is proper

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A moving party is clearly entitled to "judgment as a a matter of law" against a party who, after adequate time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2552-3 (1986).

The district court carefully analyzed Bastien's evidentiary burdens for the causes of action in question. The lengthy record before us supports the district court's conclusion that Rowland is entitled to judgment as a matter of law. Bastien's remaining claims are without merit. Accordingly, we affirm the summary

judgment of the court, based on its well-reasoned opinion. *See* 8th Cir. R. 14.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Eyvon Mendenhall
Clerk

Phone: 314-425-4315
Fts: 279-4315

Office of the Clerk
United States District Court
Eastern District of Missouri
1114 Market Street
St. Louis, Missouri 63101

July 2, 1987

TO: ALL COUNSEL

RE: 82-950C(6) - BASTIEN, ET AL VS. R. ROWLAND & CO., ET AL

Dear Counsel:

Please be advised that the above cause is set for Hearing on Attorneys' Fees on TUESDAY, JULY 7, 1987 at 9:00 a.m.

Very truly yours,

EYVON MENDENHALL, Clerk

By /s/ Barbara Kramer
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C

Court No. 6

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

PLAINTIFFS' RESPONSE AND OBJECTIONS TO DEFENDANTS' JOINT APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

(Filed: May 14, 1987)

Comes now Plaintiffs in response to and objects to Defendants' Joint Application for Attorneys' Fees and Expenses and state:

1. Ordinarily, the prevailing party *cannot* obtain attorneys' fees from the losing party. *Sterling Energy Ltd. v. Friendly National Bank*, 744 F.2d 1433, 1435[1] (10th Cir. 1984); *Hall v. Cold*, 412 U.S. 1, 4-5 (1973); *F.D. Rich Co. v. Industrial Lumber Co.*, 917 U.S. 116, 126 (1974).

2. "It is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a Plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective Plaintiff be sure of ultimate success." *Actor's Equity Ass'n v. American Dinner Theatre*, 802 F.2d 1038, 1042 (8th Cir. 1986).

3. Within the bad faith exception there must be a high degree of specificity in the actual charges and factual findings of bad

faith by the Court and the issue is whether a reasonable attorney could have concluded that facts supporting the claim *might be established,* not whether such facts *actually had been established. Dow Chemical Pacific Ltd. v. Rascator Maritime S.A.,* 782 F.2d 329, 344 (2nd Cir. 1986). Judged by the "high degree of specificity" standard Defendants' Joint Motion is devoid of substance, containing only a plethora of generalities.

4. "In the absence of a statute or enforcable contract to the contrary, the prevailing litigant is *not entitled* to collect attorneys' fees from his opponent." *Actor's Equity Assn. v. American Dinner Theatre,* supra at 1041 (8th Cir. 1986); *Lackawanna Leather v. United Food & Com. Workers,* 706 F.2d 228, 232 (8th Cir. 1983); *Syufy Enterprises v. American Multicinema, Inc.,* 602 F.Supp. 1466, 1472 (N.D. Ca. 1983); *Alyeska Pipeline Service Co. v. Wilderness Society,* 926 U.S. 290, 257-60 (1975); *U.S. v. Standard Oil Co. of California,* 603 F.2d 100, 103 (9th Cir. 1976).

5. Even if a District Court believes that a case is without merit, it does not mean that the case was frivolous or taken in bad faith. *Manhattan Coffee Co. v. International Brotherhood of Teamsters, et. al.,* 743 F.2d 621, 624-625 (8th Cir. 1984).

6. Defendants' Joint Application relies on three theories for the imposition of attorneys' fees and expenses against Plaintiffs; the American Rule (Bad Faith Rule); Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927, all of which require some showing of bad faith, *Oliveri v. Thompson,* 803 F.2d 1265, 1271-1275 (2nd Cir. 1986).

7. Under the American rule, the Court may award attorneys' fees when the opposing party has acted in *bad faith, vexatiously, wantonly* or for *oppressive reasons. Actor's Equity Ass'n v. American Dinner Theatre,* supra; *International Union, et al. v. United Form Tool Inc., Speedy Mfg. Division,* 762 76, 77 (8th Cir. 1985); *F.D. Rich Co. v. United States, ex. rel., Industrial Lumber Co.,* 417 U.S. 116, 129 (1974); *Hamilton v. Daley,* 777

1207, 1211 (7th Cir. 1985); *Transo Inc. v. AJAC Transmission Parts Co.*, 768 1001, 1025 (9th Cir. 1985), and should only be imposed on the nonprevailing Plaintiffs when the suit is frivolous, unreasonable or without foundation. *Actor's Equity Ass'n v. American Dinner Theatre,* supra at 1042; *Hamilton v. Daley,* supra.

8. Plaintiff and their attorneys have at all times acted in good faith to obtain, analyze and present evidence to support their allegations based upon extensive investigation. Defendants have alleged only generalities, not facts, to the contrary.

9. All motions and requests to this Court were based upon sound arguments of law supported by the Federal Rules of Civil Procedure and relevent cases. A great number of these motions were directed to Defendants to request compliance with Court orders in a attempt to obtain discovery to which Plaintiffs at all times believed in good faith they were entitled.

10. "The 'bad faith' exception to the American Rule is punitive, and the penalty can be imposed only in exceptional cases and for dominating reasons of justice. It requires more than a showing of a weak or legally inadequate case, and the exception is not invoked by findings of negligence, frivolity or improvidence. To be sure, it is an extremely narrow exception. . . ." *Actor's Equity Ass'n v. American Dinner Theatre,* supra. *United States v. 2,116 Boxes of Boned Beef,* 726 1481, 1488 [6] (10th Cir. 1984). *U.S. v. Standard Oil Co. of California,* supra.

11. "A party acts in bad faith *only* when the claim brought is entirely without color and has been arrested wantonly, for purposes of harassment or delay, or for other improper reasons." *Sterling Energy Ltd. v. Friendly National Bank,* supra.

12. Neither Plaintiffs' counsel nor Plaintiffs devoted the great amount of time, (in excess of 2000 hours) and money (in excess of $200,000.00) merely to harass or oppress the Defendants or delay said cause of action for any reason. There were serious issues of discovery rights and issues of non-compliance,

evidenced by the *January 26, 1984* Orders by Judge Noce, and affirmed by Judge Cahill on *June 28, 1985* and further affirmed by Judge Gunn's Order of *September 3, 1986.* There was a one year and seven month period in which all discovery was halted by the Court when Plaintiffs' amended complaint was before the Court.

13. Courts generally require a finding by the trial judge of subjective bad faith, *Sterling Energy Ltd. v. Friendly National Bank,* supra, although objective bad faith is allowed in finding Rule 11 sanctions. *Oliveria v. Thompson,* supra, at 1275. They require more than a showing of a weak or legally inadequate case. *Cornwall v. Robinson,* 654 685, 687 (10th Cir. 1981).

14. In allegations of violations of Rule 11, an objective standard is adopted whereby sanctions are imposed when it appears that a competent attorney could not form the requisite reasonable belief as to the validity of what is entered in his pleadings, motions, or other paper. *Oliveri v. Thompson,* supra. However, the Court is to *avoid hindsight* and resolve all doubts in favor of the signer and Rule 11 is violated only when it is *patently clear* that a claim has absolutely no chance of success. *Id.*

15. Rule 11 sanctions apply only when an attorney does not conduct a reasonable inquiry into the facts and law supporting the pleading. *O'Connell v. Champion International Corp.,* 812 F.2d 393, 395 (8th Cir. 1987). Plaintiffs' Counsel met with the Plaintiffs during which time Plaintiffs' Counsel conducted an extensive investigation in October, 1980 and suit was not filed until July, 1982. Rule 11 sanctions should not be imposed if the existing law had given Plaintiffs "*a glimmer of a chance*" to prevail on its claim. *Hoover Universal, Inc. v. Brockway Imco, Inc.,* 809 F.2d 1039, 1044 (4th Cir. 1987).

16. Plaintiffs believe the existing law not only gave Plaintiffs more than a glimmer of a chance of success, but supported their success on the merits. Plaintiffs relied primarily upon the cases

of *Berger v. Bishop Inv. Corp.*, 695 F.2d 302 (Dec. 10, 1982, 8th Cir.) (in which the Plaintiffs filed an Amicus Curiae Brief citing over 70 cases in support of an implied right of action under 10(b)(5)). *Huddleson v. Herman and McLean,* 640 F.2d 534 (5th Cir. 1981); *Shores Jr., et al. v. Scklar, et al.,* 647 F.2d 962 (5th Cir. 1981); *Affiliated Ute Citizens v. U.S.,* 406 U.S. 128 (1972); *Austin v. Loftsgaarden,* 675 F.2d 168, (8th Cir. 1982) (Plaintiffs obtained the files from counsel in said action and also conferred with said counsel); *Blackie v. Barrack,* 524 F.2d 891 (9th Cir. 1975) (Fraud-On-The-Market Place), *Sharp v. Coopers & Lybrandt,* 457 F.Supp. 879 (E.D. Pa. 1978), and 649 F.2d 1975 (3rd Cir. 1983) (Plaintiffs obtained the files and conferred with counsel in that case); *Ernst and Ernst v. Hochfelder,* 96 S.Ct. 1375 (1976); *Vanderboom v. Sexton,* 922 F.2d 1233 (8th Cir. 1970); *Chris-Craft Industries, Inc. v. Bango Punta Corp,* 426 F.2d 569 (2nd Cir. 1970) and *Escott v. Barchris Construction Co.,* 283 F.Supp. 643 (S.D.N.Y. 1968) to support one or more allegations in the Petition and to withstand Motions to Dismiss all of which gave Plaintiffs more than a glimmer of a chance for success.

17. 28 U.S.C. § 1927 is concerned with limiting the abuse of court procedures and to deter unnecessary delays in litigation. *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986). However, there must be a clear showing of bad faith. *Id.*

18. This Court's order of *November 8, 1985,* recognizing a minimum of discovery and ordering that all previous orders regarding discovery *against* Defendants be complied with exemplified a belief in Plaintiffs' meritorious good faith efforts to obtain discovery and Defendant's delay and violation of 28 U.S.C. § 1927. In compliance with Judge Noce's order, Plaintiffs requested documentary discovery from Defendants in September, 1985 relating to five (5) additional limited partnerships. Defendants jointly opposed said request. However, the Court ruled in Plaintiffs' favor on November 8, 1985.

19. Had this case been filed without probable cause or in subjective or objective bad faith then this Court would have

granted Defendants' Motions to Dismiss in the early stages of this case. Furthermore the Court would not have denied Defendants' Motions for Summary Judgment by its *Order of March 13, 1986* if there were any doubt that the case was taken in bad faith or unreasonably. Defendants had advantage of Plaintiffs' answers to their interrogatories in 1983 and early 1984.

20. In Defendants' Joint Application for Attorney's Fees and Expenses, there is a shot gun list of alleged practices of bad faith on the part of the Plaintiffs. These allegations themselves cannot be substantiated:

(a) Defendant's first allegation of bad faith is that "the Court has recorded more than 600 docket entries." What the Defendants fail to inform the Court is that approximately 350 of those docket entries were authored by Defendants and over 75 of those entries were authored by Judges and clerks of the Court.

(b) Defendants allege that they were required to respond to and the Court hear and decide more than 70 motions filed by Plaintiffs. Defendants failed to state to the Court that approximately 31 of these motions were motions to compel the Defendants to produce documents and answer interrogatories or were in connection with obtaining other discovery ordered by the Court on January 26, 1984.

1. For example, in regards to document discovery, Plaintiffs requested that Defendant Rand produce documents on October 14, 1983. After five additional requests, including motions to compel and 7(c) discussions, documents were finally received two years and three months later.

2. Plaintiffs originally requested document production from Defendant Attorneys on October 14, 1983. After four additional requests including motions to compel, letter requests, and 7(c) discussions, Plaintiffs began receiving documents nearly two years

later and continued to receive documents until the day of trial, March 17, 1986.

3. Plaintiffs originally requested documents on September 15, 1983, from R. Rowland & Co. After additional requests, motions to compel, and 7(c) discussions, eventually received a mere trifle of documents beginning on January 4, 1984. Plaintiffs finally received the remainder of the documents two years and two months later from the original request.

4. Plaintiffs requested documents on September 21, 1983, from Defendant Cohen. After numerous additional requests by motion to compel, and letter requests, Plaintiffs finally began receiving documents two years later.

5. Plaintiffs requested documents on September 29, 1983, from Defendant Shapiro. After numerous requests by motions to compel, letter requests, and 7(c) discussions, Plaintiffs began receiving documents five months later, but continued to receive the bulk of the documents over the next two years and never received all of the documents as ordered by the Court in its Order of November 8, 1985.

6. On October 17, 1983, Plaintiffs requested interrogatories from Laventhol and Horwath on October 17, 1983. After motions to compel, and 7(c) discussions, Plaintiffs did not completely receive all answers which were sporadically answered over the next two years and three months.

7. Plaintiffs requested answers to interrogatories on August 13, 1985, from Defendant attorneys which still are not completely answered even after numerous 7(c) discussions and the majority of which were not substantially answered until five months later.

8. Plaintiffs requested answers to interrogatories on June 20, 1983 from Defendant Cohen. After numerous motions to compel and 7(c) discussions Plaintiffs have still not received completed answers and sporadically received answers over two and one-half years.

9. Plaintiffs requested answers to interrogatories on June 15, 1983, from Defendant Shapiro. After numerous motions to compel, 7(c) discussions and letter requests, there are still interrogatories unanswered and Plaintiffs received Shapiro's answers sporadically over two and one-half years.

10. Plaintiffs requested answers to interrogatories from R. Rowland and Company on August 13, 1985. After motion to compel, and 7(c) discussions, Defendant still has not answered all interrogatories to this date and the first filing of answers was over 30 days later and was all objections.

11. Furthermore, Judge Cahill stated, *at the July 19, 1984 hearing,* that discovery should be held in abeyance until further order. *He stated that he could not establish discovery schedules until the issue of the RICO amendment was resolved.* For one year and seven months Plaintiffs' motion to amend its complaint was under advisement and not ultimately allowed until September 3, 1986.

12. This court also stayed the above cause of action in September, 1982 to permit filing of Plaintiffs' Amicus Curiae Brief in the *Berger v. Bishop, Inc. Corp.*, supra, case regarding whether an implied right of action existed under Rule 10(b)(5).

13. It is incomprehensible how the Plaintiffs can be accused of delay and obfuscation under these circumstances.

(c) Defendants state that Plaintiffs ignored deposition notices and refused to state whether they would appear for properly noticed depositions. Any deposition at which Plaintiff failed to appear was the subject of a motion for protective order filed before this Court which this Court admits were never addressed by the Magistrate. Plaintiffs did attend every deposition as scheduled by the Court or the Commissioner.

(d) Defendants state that Plaintiffs refused to answer questions regarding even the most basic facts. Plaintiffs answered hours of interrogatories and in some cases on two or three separate occasions. Counsel only objected on the basis of attorney-client privilege and work product and never instructed any client not to answer unless they based their non-answer upon those objections.

(e) Defendants state that "the Eighth Circuit Court of Appeals has three (3) times been forced to hear meritless, extraordinary, petitions by Plaintiffs." The Court of Appeals has denied certain writs *without prejudice* and at no time have they used the language meritless. In one instance the Appellate Court stated that it was not the proper time to raise the issue and that the proper time to raise the issue was after final judgment. *Defendants fail to state that they themselves have filed two (2) extraordinary writ petitions, which themselves were denied and in Defendant's terms could be classified as meritless and taken in bad faith.*

(f) Defendants state the "Plaintiffs persistent abuse of discovery required the Defendants to seek orders at every turn to compel even the most ordinary discovery." Plaintiffs obviously complied with all Defendants' Motions ruled upon on *January 26, 1984* by Judge Noce since Defendants did not subsequently file any Motions to Compel as to Interrogatories or Production of Documents since that Order. Plaintiffs could easily adopt this sentence and state that Defendants persistent abuse of discovery required

Plaintiffs to seek orders at every turn to compel even the most ordinary discovery as exemplified in paragraph 20(b) (1-12).

(g) Defendants state that "Plaintiffs failed to disclose their expert witnesses for more than a year despite proper interrogatory by the Defendants requesting that information." Plaintiffs at no time failed to disclose, through interrogatories, who their expert witnesses *for trial* would be. At the time that Plaintiffs knew who their expert witness was and who would testify as to liability at trial he was disclosed in the Answers to Interrogatories on February 5, 1986. Plaintiffs never received all the documentation to assist the one (1) liability expert witness. He was therefore limited to just the five (5) partnerships in which the Plaintiffs invested. The expert witness as to damages was revealed on January 21, 1986. He had not formulated an opinion until December, 1984 but there was no need to reveal his name since all discovery was held in abeyance and Plaintiffs had not obtained any liability experts.

(h) Defendants state that the Plaintiffs repeatedly contested settled issues, such as the propriety of a trial subpoena beyond one hundred miles and continuance of the trial date. Defendants state *issues,* in plural, but can only provide the Court with one instance in which Plaintiffs requested the Court to reconsider an order. That is because it is the only time the Plaintiffs requested the District Court to reconsider any motion which it had ruled and said Motion to Reconsider modified the earlier Motion.

(i) Defendants state that the Plaintiffs refused to comply with pre-trial orders. They state that the witness lists were masterpieces of deception. Plaintiffs provided Defendants with a clear list of the witnesses which they intended to call and also a list of witnesses which may be called. Due to the accelerated discovery process which required Plaintiffs to take or participate in thirty-eight

depositions in a period of two months, then prepare for trial and then responded to motions for summary judgment, precluded them from contacting the witnesses which they could possibly call. Plaintiffs were not permitted to take depositions of numerous other witnesses disclosed in the documents provided Plaintiffs by Defendants in November and December of 1985. Most witnesses are not spoken with ahead of time before depositions.

(j) Defendants state that Plaintiffs refused to supply intelligible exhibit lists. Plaintiffs consistently, throughout depositions and subsequent thereto, explained to counsel for Defendants the manner in which they numbered their document exhibits. The Defendants stated that they understood but then *played ignorant* before the court. The documents were numbered as follows:

038-0001 etc. - Documents received from Defendant Shapiro
030-0001 etc. - Documents received from Defendant Rand
033-0001 etc. - Documents received from Defendant Cohen
009-0001 etc. - Documents received from Defendant R. Rowland & Co.
027-0001 etc. - Documents received from Defendant Laventhol & Horwath
026-0001 etc. - Documents received from Defendant Attorneys
JB-0001 etc. - Documents received from Plaintiff Jack Bastien
RB-0001 etc. - Documents received from Plaintiff Ronald Burt
JT-0001 etc. - Documents received from Plaintiff Jane Tsuhudy
AO-0001 etc. - Documents received from Plaintiff Art O'Hare
AR-0001 etc. - Documents received from Plaintiff Arla Reed

MK-0001 etc. - Documents received from Plaintiff Mike Kickham

LW-0001 etc. - Documents received from Plaintiff Lou Werner

TY-0001 etc. - Documents received from Plaintiff Tom Yaeger

It takes a minimum of intelligence to understand the Plaintiffs' numbering system.

(k) Defendants state that the Plaintiffs refused to give copies of the exhibits for trial. Defendants did come to Plaintiffs' offices to examine all of their documents. During the depositions, it was agreed, with Judge Bloom present, that the Defendants would examine all the Plaintiffs' documents for the purpose of stipulating to their authenticity for use at trial. No Defendant requested to examine the documents for the purpose of stipulating to their authenticity. The Court, at the pre-trial hearing, stated that the Defendants should examine the documents and stipulate to their authenticity and genuineness. No Defendant complied, but now attempt to blame Plaintiffs for their own neglect. *Under the rule there is no need to provide copies when Defendants have been given the opportunity to examine documents.* Defendant did examine documents in Plaintiffs' possession.

(l) Defendants state that Plaintiffs ignored local rule 7(c). Plaintiffs had 7(c) discussions regarding documents in *1983* with Defendant Rand, Defendant Attorneys, Defendant Cohen, and Defendant Shapiro. Plaintiff had 7(c) discussions regarding documents again in 1985 with Defendant Rand, two with Defendant Attorneys, four with Defendant R. Rowland and Company, once with Defendant Cohen, two with Defendant Shapiro, and one with Defendant Laventhol and Horwath. Plaintiff had 7(c) discussions in connection with interrogatories in

1983, twice with Defendant Laventhol and Horwath, once with Defendant Cohen and once with Defendant Shapiro. Plaintiffs had 7(c) discussions in connection with answers to interrogatories in 1985, twice with Defendant attorneys, once with Defendant Cohen, once with Defendant Shapiro, and twice with Defendant R. Rowland and Company.

(m) Defendants state that the Court has been called into session on at least ten different days, three of which were full trial days, and has been harassed by countless letters addressed or copied to the Court's attention. Three full trial days and ten other separate occasions not lasting more than an hour or two, for a case set for a two-month trial, should not be considered harassment of the Court. Furthermore, some of the letters addressed to the Court were for the purpose of informing said Court of the improprieties on the part of Defendants' Attorneys and to correct misstatements to this Court by Defendants' Attorneys.

(n) Defendants state that Plaintiffs were given literally weeks to prepare for and respond to Motions for Summary Judgments. This is another example of counsel for Defendants blatant misstatements. Motions for summary judgments were denied on *March 13, 1987.* Plaintiffs prepared for a two month trial beginning on March 17, 1986. On March 20, 1986, the Court allowed the Plaintiffs eleven days to prepare a Response to six Motions for Summary Judgment. How the Defendants can interpret eleven days into weeks to prepare and respond to the Motions for Summary Judgments in light of the accelerated discovery schedule, of which this Court is well aware, is incomprehensible.

21. Each allegation by Defendants to substantiate bad faith on behalf of Plaintiffs is erroneous and contradicted by the facts and the record of the case.

22. At all times under Rule 11, counsel for Plaintiffs signed and thereby certified that each pleading motion and every other paper filed in this Court and every other Court, was based on fact and warranted by existing law or a good faith argument based upon the laws. If this Court would examine every response by Plaintiffs to Defendants' frivolous motions and allegations as to the Plaintiffs' conduct it *will see that it is the Defendants who fail to provide any cases in many instances or facts to substantiate their broad, unfounded, unsubstantiated statements.*

23. Defendants accuse Plaintiffs' counsel of conducting litigation where counsel's course of conduct in the filing of hundreds of pages of irrelevant documents, in citing dozens of cases unrelated to the real issues . . ., and bringing repetitive motions without a shred of rational basis, and in seeking to resurrect matters long since finally concluded has been at least irresponsible and has come perilously close to the abuse of process. Plaintiffs invite this Court and Defendants to point to any statement or motion by Plaintiff which has not been supported by case law in point or at least legally arguable.

24. Defendants do not point to any particular frivolous motion but believe just because seventy motions were filed by Plaintiffs then that should be dispositive of the matter. This failure is due to the fact that they *cannot.*

25. Plaintiffs have filed several repetitive motions to compel discovery because the Defendants failed to comply with the orders of this Court. Time has been wasted due to Defendants' failure to comply with said orders. On *November 8, 1985,* this Court did enter its order, which is still not complied with, requiring Defendants to comply with all previous discovery orders.

26. Defendants state that Plaintiffs ignored Court orders regarding objections at depositions, failed repeatedly to produce documents, and declined to limit the compass of their own discovery in accordance with the Federal Rules even after orders of the Court requiring them to do so. These allegations are un-

substantiated by any facts but only by the continuous misstatements of Defendants' counsel. Counsel for Plaintiffs have never ignored any Court order regarding objections at depositions *or any other order.* Plaintiffs have produced every document which they received from their clients at the time they received them which the Defendants were entitled to have in accordance with Court orders. At no time did they circumvent a Court order in regards to limiting their own discovery. The Plaintiffs continually requested the Court to enforce prior orders allowing discovery with *which Defendants* continually ignored and refused to comply.

27. Defendants state that Plaintiffs filed a patently frivolous RICO Count in an effort to circumvent the Courts documentary discovery orders. Judge Cahill, at the July 19, 1984 hearing agreed with Counsel for Plaintiffs that an amendment to the complaint should not be allowed if there is a showing of frivolity or bad faith. *The Court allowed counsel to amend its complaint.* Again Defendants can state no facts to support this allegation. Plaintiffs filed a RICO Count based upon the law and the facts alleged in their complaint and added no facts to the Complaint but merely added language sufficient to allege a RICO Count in compliance with the statute.

28. Defendants state that Plaintiffs' failure to notice deponents properly during depositions in New York and California wasted attorney time and travel expenses. Again, the facts contradict this statement by Defendants. *Judge Bloom stated that counsel for Plaintiffs acted in good faith at all times and attempted to fill the deposition schedule which they succeeded in doing.* At no time did Plaintiffs waste time during those trips. The only lapse in time was when Defendant, Joel Preston, failed to appear at his duly noticed deposition.

29. Defendants state that the Court scrutinized the Plaintiffs' allegations to provide assurance that Plaintiffs had investigated the alleged fraud and reasonably believed that a wrong has occurred. Plaintiffs and Plaintiffs' Counsel did not file suit until

one and one-half years after first coming into contact with the subject matter. Plaintiffs' Counsel, among other matters, had numerous conferences with Donald Doerge, former Vice President of Defendant R. Rowland, who made numerous statements regarding Rowland's lack of due diligence and knowledge that the investors were not receiving all the information normally provided. Frank Johnson was interviewed and agreed to testify as to his knowledge of how the motion picture limited partnerships were set up in 1973-76 period; inflated motion picture prices, non-recourse notes and secret commissions. Plaintiffs' Counsel had conferences with Internal Revenue attorneys and agents in connection with their investigation of Defendants Shapiro, Cohen and Davis. Based upon that investigation, Plaintiffs' Counsel and Plaintiffs reasonably believed that the allegations in the complaints were accurate and supported by evidence.

30. Plaintiffs object to the Defendants' Joint Application for Attorneys' Fees and Expsenses for its failure to state any grounds upon which said relief can be granted.

WHEREFORE, Plaintiffs request this Court to deny Defendants Joint Application for Attorneys' Fees and Expenses and any other relief this Court deems just and fair under the premises.

LUPO & STEMMLER

By/s/ David G. Lupo
David G. Lupo #15006
Attorney for Plaintiffs
818 Olive Street, Suite 1240
St. Louis, Missouri 63101
(314) 436-4130

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0950C(6)

Jack D. Bastien, et al.,
Plaintiffs,

v.

R. Rowland & Co., Inc., et al.,
Defendants.

ORDER

(Filed July 20, 1987)

IT IS HEREBY ORDERED that the above-styled cause of action be and it is set for a one-day evidentiary hearing directed to the limited issue of the individual plaintiffs' liability for Rule 11 sanctions. The Court will expect the parties to work out time allocations, allowing time both for oral testimony of the plaintiffs and rebuttal. The Court would welcome affidavits in lieu of oral testimony: the parties may either rest on affidavits already filed with the Court or file supplementary affidavits. The hearing will be held on July 30, 1987 at 9:30 a.m. in Courtroom 6.

Dated this 20 day of July, 1987.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, et al.,
Plaintiffs,

v.

R. ROWLAND & CO., INC., et al.,
Defendants.

ORDER

(Filed: August 7, 1987)

This matter is before the Court on the joint application of defendants for attorneys' fees and expenses. The Court has reviewed the record and the affidavits submitted in support of and in opposition to defendants' application, heard argument on the appropriateness of a fee award pursuant to Rule 11, Fed.R.Civ.Pro., and held an evidentiary hearing at which individual plaintiffs testified to their personal involvement in the filing and conduct of this litigation. Upon consideration of the history and purpose of Rule 11, the Court concludes that a partial fee award is appropriate in this case. Accordingly,

IT IS HEREBY ORDERED that plaintiffs and their counsel pay to defendants a sanction in the amount of $100,000.00. $50,000.00 shall be paid by counsel for plaintiffs. $25,000.00 shall be paid by plaintiff E. Louis Werner. The remaining $25,000.00 shall be paid in equal parts by plaintiffs Jack D. Bastien, Arthur F. O'Hare, Jane S. Tschudy, Michael J. Kickham, Arla E. Reed, Thomas W. Yager and Ronald B. Burt.

On March 25, 1987 the Eighth Circuit Court of Appeals affirmed this Court's order granting summary judgment to defendants in the above-syled cause of action. In its opinion the Court of Appeals 'highlighted the distinguishing characteristic of

this lawsuit: "The costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter." *Bastien v. Rowland,* slip op. No. 86-1519 (8th Cir., March 25, 1987) (per curiam).[1] On the eve of trial, after nearly four years in which to conduct discovery, plaintiffs stood wholly without proof of their claims. Defendants have filed affidavits in support of their application for fees and expenses reflecting expenditures in defense of this ultimately meritless litigation that approach one million dollars ($1,000,000.00).

Amended Rule 11 of the Federal Rules of Civil Procedure directs a trial court to "impose . . . an appropriate sanction" against the person who signed [a pleading], a represented party, or both," upon a determination that the pleading was unfounded or interposed for improper purposes. The decision to award sanctions is discretionary with the trial court, as is the identification of the "appropriate sanction" and, if a fee award, the appropriate amount. *See generally Advisory Committee Notes to Rule 11* ("The court . . . retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case. . . ."). The standard for review of an attorney's conduct for purposes of the Rule is objective: "[S]anctions shall be imposed [if], after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law. . . ." *Eastway Construction Corp. v. City of New York,* 762 F.2d 243, 254 (2d Cir. 1985).

Rule 11 does not address the procedural rights of attorneys and clients who are threatened with sanctions, and the development of the law is unclear. *See Donaldson v. Clark,* slip op.

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[1] This Court set forth an extensive procedural history of the case in its order granting summary judgment of April 17, 1986. A cursory review of the twenty-four volume case file provides ample illustration of the manner in which this litigation was conducted. The Court will not, therefore, repeat the tangled narrative.

No. 85-8270 (11th Cir. June 24, 1987); *Eastway Construction Corp. v. City of New York,* 637 F.supp. 558, 568 (E.D. N.Y. 1986); *reversed in part on other grounds,* 1987-1 Trade Cas. (CCH) ¶67,601 at 60,602 (2d Cir. June 8, 1987). While the courts are correctly concerned with cost escalation—particularly in a case such as the one before this Court—at least minimum due process safeguards must be ensured. *See Advisory Committee Notes to Rule 11.*

This Court, already familiar with the record in this matter, heard oral argument on defendants' motion and provided plaintiffs the opportunity to make a record on their participation in the litigation. The Court believes that the due process rights of neither plaintiffs nor their counsel have been jeopardized by the proceedings on the Rule 11 issue.

Upon consideration of the record in this case the Court concludes that plaintiffs' counsel conducted the litigation in a manner that escalated costs unnecessarily and vexatiously. Whether or not a competent attorney could form a reasonable belief as to the viability of the original complaint, the conduct of the litigation from the time this Court inherited the file in 1985, which comprises the bulk of the filings, was frivolous and abusive and not directed toward the "just, speedy and inexpensive determination of [the] action," Rule 1, Fed.R.Civ.Pro. The Court does not hold plaintiffs blameless. This was their litigation, and their counsel must be deemed to have acted at their direction.

At the outset of trial the Court stated its belief that plaintiffs should settle their claims against defendants. Testimony at the July 30th hearing established that seven of the plaintiffs were prepared to agree to a settlement. Because plaintiff Werner refused to engage in good faith efforts to resolve the litigation without incurring the costs of trial, the Court finds that he should bear the greater share of costs imposed on plaintiffs.

$100,000.00 represents a fraction of the fees and costs incurred by defendants in this suit. The Court will not, therefore,

engage in a determination of the reasonableness of particular fees and costs charged to its defense. The Court finds the amount appropriate as a sanction for bad faith conduct on the part of plaintiffs and their counsel.

Dated this 7th day of August, 1987.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-2296

Appeals from the United States District Court
for the Eastern District of Missouri.

David G. Lupo and James A. Stemmler,
Appellants,

Jack D. Bastien, Arthur F. O'Hare, Jane S. Tschudy,
E. Louis Werner, Jr., Michael J. Kickham,
Arla E. Reed, Thomas W. Yager and Ronald B. Burt,

v.

R. Rowland and Company, a Missouri Corporation,
Joseph G. Wohl, Carol Wohl and David Weiss, Executors,
Irwin M. Rosenthal, Jacob W. Heller, Herman Schwartzman,
Leonard I. Weinstock, David M. Garelik, Andrew W. Dave,
Marcel Shwergold and Elkan Abramowitz, Edmond M. Coller,
Richard F. Horowitz, Howard L. Mann, E. Cooke Rand,
Howard S. Jacobs, R. Mitchell Mass, Edward Fingerman,
Weiss, Rosenthal, Heller & Schwartzman, a dissolved legal
partnership, Laventhol & Horwath, an accounting partnership,
Richard W. A. Davis, Richard W. A. Davis, as Trustee for
Richard W. A. Davis, Inc., a dissolved Florida Corporation,
Harold Rand, Harold Rand, d/b/a Harold Rand & Company
Public Relations, Joel Preston, Irving Cohen, Irving Cohen,
d/b/a The Astro Group, Ltd., I.C.A. Productions, Inc.,
a dissolved New York Corporation, Stanley Levine, Ted
Shapiro, Ted Shapiro, d/b/a The Astro Group, Ltd.,
Raymond E. Rowland, Jr., Robert R. Rust,
Appellees.

No. 87-2297

David G. Lupo and James A. Stemmler,
Appellees,

Jack D. Bastien, Arthur F. O'Hare, Jane S. Tschudy,
E. Louis Werner, Jr., Michael J. Kickham, Arla E. Reed,
Thomas W. Yager and Ronald B. Burt,

v.

E. Rowland and Company, a Missouri Corporation,
Appellant,

Joseph G. Wohl, Carol Wohl and David Weiss, Executors,
Irwin M. Rosenthal, Jacob W. Heller, Herman Schwartzman,
Leonard I. Weinstock, David M. Garelik, Andrew W. Dave,
Marcel Shwergold and Elkan Abramowitz, Edmond M. Coller,
Richard F. Horowitz, Howard L. Mann, E. Cooke Rand,
Howard S. Jacobs, R. Mitchell Mass, Edward Fingerman,
Weiss, Rosenthal, Heller & Schwartzman, a dissolved legal
partnership, Laventhol & Horwath, an accounting partnership,
Richard W. A. Davis, Richard W. A. Davis, as Trustee for
Richard W. A. Davis, Inc., a dissolved Florida Corporation,
Harold Rand, Harold Rand, d/b/a Harold Rand & Company
Public Relations, Joel Preston, Irving Cohen, Irving Cohen,
d/b/a The Astro Group, Ltd., I.C.A. Productions, Inc., a
dissolved New York Corporation, Stanley Levine, Ted
Shapiro, Ted Shapiro, d/b/a The Astro Group, Ltd.,

Raymond E. Rowland, Jr., Robert R. Rust,
Appellants.

Submitted: May 10, 1988

Filed: September 20, 1988

Before WOLLMAN and BEAM, Circuit Judges, and RE,* Chief Judge.

BEAM, Circuit Judge.

David G. Lupo and James Stemmler appeal the imposition of sanctions under Fed. R. Civ. P. 11 in the amount of $50,000 for conducting litigation in bad faith and in a frivolous and abusive fashion. We affirm.

I. FACTS

Lupo and Stemmler are attorneys who represented eight plaintiffs in a securities fraud case. The suit was brought against R. Rowland and Co., Inc., a St. Louis brokerage firm, two of Rowland's officers, an accounting firm, members of a New York law firm and others involved with the syndication of limited partnerships. The plaintiffs had purchased, through Rowland, partnership interests in five limited partnerships with which the other defendants were involved. The limited partnerships were organized to purchase and distribute motion pictures, a highly speculative and risky venture. The plaintiffs invested in the partnerships for the primary purpose of sheltering their other income through the use of income tax deductions created through partnership participation. However, the Tax Reform Act of 1976 placed limits on the tax benefits the plaintiffs derived from their investment. In addition, the partnerships proved to be unprofitable. As a result, the plaintiffs filed suit alleging that the defendants defrauded them of their investment by organizing the partnerships in such a way that the general partners were yielded benefits but the limited partners did not receive a profit.

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* The HONORABLE EDWARD D. RE, Chief Judge, United States Court of International Trade, sitting by designation.

Discovery took almost four years and when the trial finally began on March 17, 1986, the district court instructed the plaintiffs that they would have three days to present sufficient evidence to overcome the defendants' motions for summary judgment. If at the end of the three days the plaintiffs had failed to present sufficient evidence, the court stated that it would grant the defendants' motions.

After three days of presentation of evidence by the plaintiffs, the court dismissed the jury. On March 31, 1986, the court sustained the defendants' motions for summary judgment. This was noted by an entry on the courtroom minute sheet by the court's deputy clerk and by an entry on the court's docket book.

On April 17, 1986, the district court filed an opinion explaining the basis of the March 31, 1986, ruling and stating that summary judgment was granted on March 31, 1986.

On May 7, 1986, the defendants filed a joint application for attorneys' fees and costs pursuant to Fed. R. Civ. P. 11. On August 7, 1987, the court ordered a total of $100,000 in sanctions under Rule 11 and assessed $50,000 of those sanctions against Lupo and Stemmler, who appeal the imposition of sanctions against them. The remaining $50,000, which was assessed against the plaintiffs in the case, has been paid.

II. DISCUSSION

A. Jurisdiction to Impose Rule 11 Sanction

Lupo and Stemmler first assert that the district court lacked jurisdiction to impose Rule 11 sanctions because the defendants' application for such relief was not timely filed. Rule 30 of the Local Rules of the United States District Court for the Eastern District of Missouri requires a claim for attorneys' fees to be filed no later than "twenty-one (21) days after entry of judgment on the merits." The defendants filed their request on May 7, 1986, 20 days after the filing of the district court's opi-

nion but more than 21 days after the entry on the docket noting the granting of summary judgment. Lupo and Stemmler claim that the entry of the judgment on the docket constituted entry of judgment on the merits for purposes of Local Rule 30. However, every judgment is required by Fed. R. Civ. P. 58 to be set forth on a separate document. Therefore the granting of the defendants' motions for summary judgment cannot have constituted the entry of judgment on the merits as required by Local Rule 30 because there was no separate document involved. Neither the courtroom minute sheet nor the court's docket book constitute a separate document. *See generally United States v. Indrelunas,* 411 U.S. 216 (1973).

The district court's memorandum and order dated April 17, 1986, is also not a final order under Rule 58. In *Baity v. Ciccone,* 507 F.2d 717, 718 (8th Cir. 1974), we found that the "requirement [of a separate document] is not met by a provision within a court's memorandum opinion and order to the effect that judgment be entered." In order to meet this requirement, a separate document must be prepared "which is distinct from any other document entered in the case * * * ." *Cloyd v. Richardson,* 510 F.2d 485, 486 (6th Cir. 1975). Therefore in actuality there was no entry of judgment on the merits from which the 21 day time limit of Local Rule 30 began. However, an appeal was heard by this court on the merits of the case, *Bastien v. R. Rowland & Co.,* No. 86-1519 (8th Cir. Mar. 25, 1987) (cited at 815 F.2d 713), and this issue was apparently not raised by the parties. They have, therefore, waived any objection they may have had regarding this issue. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978) (per curiam). It is clear that it was the intent of the district court that the entry of judgement was to occur with the filing of the memorandum and order. *Bastien v. R. Rowland & Co.,* 116 F.R.D. 619, 621 n.1 (E.D. Mo. 1987) (*Bastien II*). Therefore we deem the entry of final judgment in this case to have been no earlier than April 17, 1986, and find that the defendants' joint application for attorneys' fees and costs was timely made.

Lupo and Stemmler claim, in the alternative, that the defendants' Rule 11 motion was a motion to amend the judgment under Fed. R. Civ. P. 59(e) and, therefore, was to have been filed within 10 days of the entry of judgment. Lupo and Stemmler assert that even assuming judgment was entered on April 17, 1986, the defendants' motion was not filed within the required 10 days and, therefore, the district court lacked jurisdiction to impose sanctions. However, we held in *Obin v. District No. 9 of the Int'l Ass'n of Machinists,* 651 F.2d 574 (8th Cir. 1981) that an application for attorneys' fees is a collateral and independent claim and need not be filed within the 10 day time period for motions under Rule 59(e). The Supreme Court agreed with this finding in *White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445, 450 (1982) stating that the purpose of Rule 59(e) is to permit a court "to rectify its own mistakes in the period immediately following the entry of judgment." While neither of these decisions squarely considered the issue of the relevance of Rule 59(e) to Rule 11 sanctions, we find that the analysis of these cases is applicable. "We conclude * * * that a [Rule 11] motion * * * raises a collateral and independent claim, not * * * a matter integral to the merits of the action." *Obin,* 651 F.2d at 582. Therefore the 10 day requirement of Rule 59(e) is not applicable.

B. Imposition of Sanctions Under Rule 11

Rule 11 states, in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. * * * If a pleading, motion, or other

> paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Lupo and Stemmler assert that no specific papers filed with the court by the plaintiffs were designated as violating Rule 11 in either the defendants' joint application for attorneys' fees and expenses or the district court's order imposing sanctions. Therefore, Lupo and Stemmler claim that the imposition of Rule 11 sanctions was inappropriate.

The district court based its decision to impose sanctions upon the full record of the case. It "conclude[d] that plaintiffs' counsel conducted the litigation in a manner that escalated costs unnecessarily and vexatiously." *Bastien II,* 116 F.R.D. at 621. The district court also concluded that "the conduct of the litigation * * * was frivolous and abusive and not directed toward the 'just, speedy and inexpensive determination of [the] action.' " *Id.* (citing Fed. R. Civ. P. 1). Lupo and Stemmler urge that it is fundamentally unfair for the district court to have based the sanctions on the "bulk of the filings" and the "conduct" of the litigation because they were not given sufficient notice as to which papers were the basis of the court's ruling. Without fair notice of the alleged Rule 11 violations, Lupo and Stemmler claim that the evidentiary hearing afforded them under Rule 11 was rendered meaningless.

We recognize that "[t]he imposition of sanctions is a serious matter and should be approached with circumspection." *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987). Although we prefer that courts identify specific pleadings or other documents when imposing Rule 11 sanctions, we find that the district court had adequate support for proceeding as it did and that Lupo and Stemmler had fair notice of

the basis of the court's ruling. The purpose of Rule 11 is to "compensat[e] the offended party for the expenses caused by a violation as well as penaliz[e] the offender * * * ." *Sanctions Under the New Federal Rule 11—A Closer Look,* 104 F.R.D. 181, 201 (1985). As the district court noted in its memorandum and order granting the defendants' motions for summary judgment, "[t]he history of this case * * * is tortured." *Bastien v. R. Rowland & Co.,* 631 F. Supp. 1554, 1557 (E.D. Mo. 1986) (*Bastien I*). The parties were involved in constant battles over the scope and priority of discovery, and eventually, in December of 1985, a Special Master was appointed to preside over the taking of all depositions. In February of 1984, nearly 19 months after the filing of the original petition, the plaintiffs sought leave of the court to file an amended complaint, adding a count under the Racketeer Influenced and Corrupt Organizations (RICO) Act. In December of 1985, plaintiffs began attempts to delay the trial following the incapacitation of Lupo due to illness. This is only a brief review of the facts that the district court considered in deciding to sanction Lupo and Stemmler as well as the plaintiffs in the case. In its earlier summary judgment decision, the district court provided a more detailed summary of the events leading up to trial. *Bastien I,* 631 F. Supp. at 1554-59.

Our review of the facts reveals overwhelming support for the imposition of the sanctions. The defendants as a whole spent over $1,000,000 defending this case. In fact, "[t]he costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter." *Bastien,* slip op. at 2. As such, we find that the $50,000 sanction was certainly well within the parameters of reasonability and that the district court did not abuse its discretion in imposing the sanctions. The amended petition adding the RICO count certainly meets the requirement of a pleading signed in violation of Rule 11. The claim was not "well grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law * * * ." Fed. R. Civ. P. 11.

In addition to supporting the Rule 11 sanctions, the district court's findings were broad enough to support sanctions under 28 U.S.C. § 1927. Section 1927 authorizes sanctions against any attorney "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously * * * ." The district court found that Lupo and Stemmler had "conducted the litigation in a manner that escalated costs unnecessarily and vexatiously." *Bastien II,* 116 F.R.D. at 621. Giving great deference to the findings of fact and conclusions of the district court as required, *Kurkowski v. Volcker,* 819 F.2d 201, 203 n.8 (8th Cir. 1987), we find that this provides us with an alternative ground for affirmance.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-2296/2297EM

David G. Lupo and James A. Stemmler,
Appellants/Cross-Appellees,

vs.

R. Rowland and Company, etc., et al.,
Appellees/Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Missouri.

Appellants' petition for rehearing en banc and supplemental petition for rehearing en banc of James Stemmler have been considered by the Court and are denied.

Judge Theodore McMillian would have granted the petitions.

Petitions for rehearing by the panel are also denied.

January 3, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

Rule 11; Federal Rules of Civil Procedure

NOTES OF ADVISORY COMMITTEE ON RULES

* * * * * *

1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 64-65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, Federal Practice ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or con-

ducting litigation. *See, e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752, (1980); Hall v. Cole, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. *See, e.g., Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078 (2d Cir.1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. *See, e.g., Heart Disease Research Foundation v. General Motors Corp.,* 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. *See Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D.Pa.1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. *See Nemeroff v. Abelson,* 620 F.2d 339 (2d Cir.1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as

to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations. *See Haines v. Kerner,* 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. *See Murchison v. Kirby,* 27 F.R.D. 14 (S.D.N.Y.1961); 5 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. *See National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. *See North American Trading Corp. v. Zale Corp.,* 73 F.R.D. 293 (S.D.N.Y.1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an

unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure:* Civil § 1334 (1969); 2A Moore, *Federal Practice* ¶ 11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. *See Browning Debenture Holders' Committee v. DASA Corp., supra.* This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction pro-

ceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

1987 Amendment

The amendments are technical. No substantive change is intended.

CLEVELAND STATE UNIVERSITY

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November 17, 1987

Paul H. Tobias, Esq.
Tobias & Kraus
911 Mercantile Library Building
414 Walnut Street
Cincinnati, Ohio 45202

Dear Mr. Tobias:

Thank you for the kind comments regarding my presentation at the PELA Conference.

Here are the statistics and sources:

1.) In discrimination cases, federal judges appointed by Pres. Reagan find for the plaintiff in 24% of the cases, versus 69% findings for plaintiffs by Democratic appointees. Note, *All The President's Men? A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals,* 87 COLUM. L. REV. 766, 783 (1987).

2.) The Rule 11 statistics are from Nelken, *Sanctions Under Amended Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment,* reprinted in PLI, RULE 11 AND OTHER SANCTIONS (1987).

   a.) Civil rights cases accounted for 7.6% of federal court filings between 1983 and 1985 but 22.3% of the Rule 11 cases. (p. 257)

b.) From 1983 to 1985 only 11.2% of the Rule 11 cases involved contract claims (35.7% of federal court filings). (p. 257)

c.) Defendants sought sanctions against plaintiff's counsel in 54% of the cases (granted 44% of the time), while plaintiffs sought sanctions against defense counsel in only 15.5% of the cases (granted 46% of the time). (p. 258).

It was a pleasure meeting you at the conference. Please do not hesitate to contact me again if I can be of assistance.

Sincerely,

/s/ Stephen W. Gard

Journal of Missouri Bar
January-February 1989
Pages 67-69

RULE 11 SANCTIONS: AVOIDING THE WOODSHED

By Mark B. Berry

Court imposed sanctions do not only happen to lawyers in other jurisdictions. In the recent decision of *Lupo v. Rowland & Co.*, the 8th Circuit affirmed an award of sanctions in the amount of $100,000, which was entered by the court in the Eastern District of Missouri. Rule 11 of the Federal Rules of Civil Procedure and Rule 55.03 of the Missouri Rules of Civil Procedure impose new obligations on Missouri attorneys prior to the filing of a pleading. These obligations have a far-reaching effect which Missouri attorney's should become familiar with in order to "avoid the woodshed."

THE DISTRICT COURT in *Smith International Inc. v. Texas Commerce Bank National Association*[1] granted an award of $230,000 in sanctions against the plaintiffs and their counsel. An award for sanctions of $167,000 was entered by the court in *Ginther v. Texas Commerce Bank.*[2] Federal judges have increasingly employed sanctions under Rule 11 to curtail frivolous pleadings. In fact, many courts have zealously embraced Rule 11 as well as Rules 16, 26 and 37 of the Federal Rules of Civil Procedure. These courts have been anything but reluctant to impose fines and sanctions, in some instances as high as six figures, to deter pleading abuses.

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[1] 643 F.Supp. 14 (S.D. Tex. 1986).

[2] No. H-856919 (S.D. Tex. April 23, 1986).

In 1983, Rule 11 of the Federal Rules of Civil Procedure was amended. The Advisory Committee notes to Rule 11 state that "the new language was intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions." Courts are now imposing sanctions on a regular basis. There have been more than 1,000 Rule 11 decisions rendered since the rule was amended in 1983.[3]

Court imposed sanctions are not something that only happen to lawyers in other jurisdictions. Recently, the Eighth Circuit affirmed an award of sanctions in the amount of $100,000, entered by the court in the Eastern District of Missouri.[4] Half of the total amount of sanctions assessed was against counsel. Under the new rules of procedure, it behooves Missouri lawyers to consider the new obligations imposed on them under Rule 11 and Rule 55.03 prior to the filing of any pleading.

In Part, amended Rule 11 reads as follows:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; and to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Effective July 1, 1986, Rule 55.03 of the Missouri Rules of Civil Procedure was amended. The new Rule 55.03 was "bor-

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[3] August 1, 1987, ABA JOURNAL, p. 88.

[4] Lupo v. Rowland & Co. (8th Cir. Sept. 20, 1988).

rowed" from amended Rule 11. The two rules are substantially the same.

The Missouri Supreme Court has only heard one case involving the revised Rule 55.03.[5] The dissent in that case makes it clear that the decisions on Rule 11 from the Federal authorities are "highly persuasive."

The standard under Rule 11 is an objective one of reasonableness under the circumstances.[6] This marks a dramatic change from the subjective standard of bad faith. Prior to the 1983 amendment, only willful violations of Rule 11 were punishable.[7]

The new pleading rule operates by making the attorney's signature a certification. The rule provides that sanctions "shall" be imposed against the person, firm or entity ultimately responsible for the decision to file the pleading which does not comply with the rule. Since a client does not normally make tactical decisions on the conduct of litigation, it is the lawyer who is personally at risk for any procedural abuses. Sanctions may be imposed despite a finding that the lawyer acted in good faith.[8]

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[5] State ex rel. McMullin v. Satz, Mo. Sup. Ct. #70491; Nov. 15, 1988.

[6] Pantry Queen Foods v. Lifshutz FastFreight, 809 F.2d 451, 453 (7th Cir. 1987).

[7] 100 HARV. L.R. 630, 632.

[8] §514.205, RSMo (compare the statutory provision for frivolous suits).

Rule 11 requires two basic determinations to be made by counsel prior to filing a pleading. To avoid sanctions, counsel should be aware of the following: One, the rule requires a reasonable belief that the pleading "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modifications, or reversal of existing law." Second, under the rule, the pleading must not have been filed for "any improper purpose."

It is not necessary for a court to identify a specific pleading that is in violation of the rule when imposing sanctions.[9] Sanctions can be based on the "bulk of the filings" and the "full record of the case," in general and not on a specific pleading.

There is a split in the circuits as to whether Rule 11 imposes a continuing obligation on an attorney with respect to pleadings previously filed. The Second Circuit has found that "there is no continuing obligation on the part of an attorney to withdraw a paper asserting a claim that later proves to be groundless."[10] However, the Fifth Circuit has reached the opposite conclusion.[11] As a result, good practice would dictate that the same consideration should be given to pleadings already filed as is given to a pleading which is being prepared to be filed.

REASONABLE BELIEF. The amended rule imposes on counsel an affirmative duty to conduct an objectively reasonable pre-filing inquiry into the relevant facts and the

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[9] Lupo v. Rowland & Co., (8th Cir. Sept. 20, 1988).

[10] Oliveri v. Thompson, 803 F.2d 1265; Calloway v. Marvell Entertainment Group, 111 FRD 637, 687.

[11] Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987).

law.[12] Before filing a pleading, counsel is now obligated to determine that it is well grounded in fact and warranted by the law or a good faith argument for a change in the law. Counsel is required to conduct a reasonable investigation into the facts.

As a part of this reasonable inquiry, an attorney should confer directly with the client to verify facts. This is especially true where there are facts known to counsel which would give counsel reason to suspect the accuracy of the client. However, an attorney cannot rely solely on a client's statement where there are other means available to verify the facts. Personal interviews with key witnesses may be required. In at least one case, sanctions were imposed against counsel who conducted no personal interviews and "the limited telephone inquiries did not meaningfully address the relevant facts."[13] Counsel may be required to review key documents and records. In addition, counsel may even find it necessary to consult an expert before filing suit.[14]

There is a variance in the circuits as to whether Rule 11 imposes upon counsel a duty of candor to cite contrary authority.[15] For now, the predominant opinion appears to be that Rule 11 does not require counsel to differentiate between a "good faith argument for the extension, modification and

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[12] Taylor v. Belger Cartage Serv., Inc., 102 FRD 172, 180.

[13] Wold v. Minerals Engineering Co., 575 F.Supp., 166, 176 (Col. 1983).

[14] Calloway v. Marvel Entertainment Group, 111 FRD 637, 647; 650 F.Supp. 684 (S.D. N.Y. 1986).

[15] August 1, 1987 ABA JOURNAL, p. 87, 89.

reversal of existing law" and a position already "warranted by existing law."[16]

LEGITIMATE PURPOSE. The second prong of Rule 11 requires that the pleading not be filed for "any improper purpose." An "improper purpose" may be manifested in many different ways. The rule specifically prohibits pleadings designed to "harass or to cause unnecessary delay or needless increase in the cost of litigation." The focus has primarily been on counsel who engage in delaying tactics. However, other examples of pleadings filed for an improper purpose might include the filing of a meritless counterclaim or the filing of a pleading to force a judge or other counsel to disqualify themselves.[17] In *Chu By Chu v. Griffith,* 771 F.2d 79 (4th Cir. 1985), the court found a suit was filed for the improper purpose of attempting to force a judge to recuse himself.

Finally, an improper purpose is usually inferred from the bringing of a suit or the filing of a motion which has already failed.[18] Sanctions were awarded by the court against the plaintiff in *Andrea v. Merrill Lynch Ready Assets Trust,* 97 FRD 699 (S.D. NY 1983). The award of sanctions came after an adverse ruling on the merits of the case when counsel attempted to refile what amounted to be essentially the same complaint. Also, see *Bastien v. R. Rowland & Co.,* 116 FRD 619 (E.D. Mo 1987) in which sanctions were imposed for filing and maintaining a lawsuit in which the court had previously granted summary judgment.

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[16] Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).

[17] Wold v. Minerals Engineering Co., 575 F.Supp. 166 (Col. 1983).

[18] April 1987 TEXAS BAR JOURNAL, p. 379, 382.

A recent case even suggests that the common practice of making an inflated demand in the prayer can result in sanctions. In the case of *Hudson v. Moore Business Forms, Inc.*, the court states that the use of "offhanded, casual or retaliatory damage prayers is one of the abuses that Rule 11 is particularly designed to discourage."[19]

CONCLUSION. The practice of law involves many varied types of risks. Both federal and state rules of procedure impose a tough standard of conduct on all parties and their attorneys. An objective standard of reasonableness has replaced bad faith as a prerequisite to sanctions. An unwary attorney may find himself personally liable for a violation of Rule 11 or Rule 55.03. A liability which is not normally covered under any professional liability policy.[20]

When preparing any pleading to be filed with the court, counsel should keep in mind the two basic requirements of Rule 11 and Rule 55.03. One, all pleadings must be "well grounded in fact" and "warranted by law." Two, the pleadings must not be filed for any "improper purpose." The failure to follow these requirements "shall" result in sanctions under either Rule 11 or Rule 55.03.

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[19] Hudson v. Moore Business Forms Inc., 827 F.2d 450, 448 (9th Cir. 1987).

[20] The most recent Bar Plan policy contains an exclusion which provides that there will not be coverage for "fines, penalties, sanctions, costs and fees imposed by a court under state or federal statute or rules of procedure." Other carriers also exclude coverage for sanctions. You should consult your professional liability policy.

Litigation Magazine Summer 1987
Volume 13 Number 4

TRIAL BALLOON

Frivolity in Court: New Rule 11

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by William G. Swindal

Things are getting out of hand with Rule 11. You may think you have heard this all before—the amended rule has led oppressed lawyers and hard-nosed jurists to write article after article about one another. But the Rule 11 problem is progressive: The longer it goes on, the worse it gets.

I should begin by saying that Rule 11 is based on some commendable concepts. Lawyers who play foul in litigation should be punished. Baseless lawsuits should result in more than a shrug. Lawyers who repeatedly waste time and abuse discovery should be given strong reasons for stopping.

Before the rule was amended, it was too weak to serve its appropriate ends. So the problem is *not* that the rule was given teeth four years ago.

Instead, the problem with Rule 11 is that it is applied inconsistently. In some courts, it has not only teeth, but fangs. In others, there are no teeth at all. Some lawyers get painfully bitten by the rule, some get nipped, and some just get gummed.

Consider this: Recently we defended two nearly identical lawsuits in federal court in Chicago. In both cases our client was a lawyer who had prepared personal services contracts for professional athletes. The plaintiffs were represented by the same lawyer, and each case raised the same claims in attacking

our client's handling of the athletes' interests. In fact, the only material difference in the two cases—which turned out to be a big one—was that the cases were assigned to different judges.

During discovery, both plaintiffs sought production of all professional service contracts our client had negotiated for anyone in a given time period. We filed the same objections in each case, but the result was not the same. In one case, the objections were sustained. In the other, the judge found the objections frivolous and imposed sanctions on us under Rule 11.

Or consider this: Anyone who has handled more than one lawsuit surely has settled at the eleventh hour on the courthouse steps. Some cases even settle on the day of trial or during trial. Most experienced litigators would say that is human nature. Clients usually feel they have left money on the table if they settle too soon.

The chief judge of the western district of Pennsylvania apparently views human nature differently. He enforces his view with Rule 11. In *Eash v. Riggins Trucking Inc.*, vacated on procedural grounds, 757 F.2d 557 (3rd Cir. 1985), the defendant made a settlement offer on the day of trial. The plaintiff accepted. The case was over, right? Not quite. Without notice or a hearing, Chief Judge Teitelbaum imposed Rule 11 sanctions on defense counsel.

Judge Teitlebaum's sanction order (reproduced at 757 F.2d 571-72) criticized the defense lawyers for waiting so long to make a settlement offer. The judge felt that the lawyers could have moved sooner in response to the plaintiff's repeated requests to settle. Defense counsel—who tried unsuccessfully to dispute the judge's view of the facts—were ordered to pay juror per diem costs personally.

What is going on? These decisions—and they are not isolated examples—make no sense. The inconsistencies come in two forms: Procedural and substantive.

A little history helps explain why. Before the 1983 amendment, Rule 11 imposed a subjective standard on lawyers: Only if an attorney willfully proceeded in bad faith would sanctions be ordered. By 1983, this standard was considered too tame. One problem was that baseless claims by inept lawyers could be defended as the product of ignorance, not guile. A bigger problem was how to tell the difference. How do you determine what a lawyer has in his mind?

So the draftsmen of the federal rules turned to an objective standard. Sanctions now depend on the facts and circumstances of the case, not on the state of mind of the trial lawyer. See Schwarzer, "Sanctions Under the New Federal Rule 11," 104 F.R.D. 181 (1985). An avowed aim of the change was to make the rule more stringent and to trigger sanctions more often.

In fact, imposing an objective standard amounts to assessing fees as a matter of strict liability in many cases. No longer is an attorney protected by his actual good faith. Now he can be held personally liable for his adversaries' fees even if he honestly believed his conduct was right.

Judges Don't Agree

Many district judges have embraced the amended rule's encouragement of sanctions with relish and sometimes with abandon. The advance sheets increasingly contain cases warning that untoward conduct will be dealt with severely.

Embedded in this rush to sanction is a serious difficulty. Under the guise of objectivity, one subjective standard has been substituted for another. Instead of the subjective good faith of the lawyer, the governing standard now is the subjective view of hundreds of judges about how a reasonable lawyer will act. By this substitution, the federal trial bench has become an ad hoc disciplinary committee, with each judge having exclusive jurisdiction over any lawyer who appears before him or files a paper with him.

The difficulty is obvious: Judges, like lawyers, do not always agree. Virtually all judges have very strong views about how lawyers should conduct themselves. But few judges hold the same view. Before, it was enough that the lawyer himself believed that a goodfaith argument could be made for the extension, modification, or reversal of existing law. Now counsel must speculate about what each judge will think if a particular contention is questioned. As we now know from painful personal experience, lawyers risk being punished by one court for conduct endorsed by another.

Such inconsistencies do not mean that the courts ignore the need for general principles controlling the rule's application. Some courts are concerned about the issue, but the results have not been illuminating. For example, many cases say that "frivolous" arguments and claims will be punished. But the word "frivolous" appears nowhere in Rule 11. What does it mean? Sham? Superficial? Entirely unjustified? There is a range of attorney conduct, from heroically exemplary to absolutely ridiculous or cravenly dishonest. The question is where along this continuum the lawyer's conduct will lead to sanctions.

The word *frivolous* simply does not define the sanction point very sharply. More importantly, a lot of attorney conduct gets sanctioned that scarcely seems frivolous. Frivolity, after all, is in the eye of the judicial beholder.

There have been more rarified, but no more successful, attempts to standardize Rule 11. Just naming these intellectual constructions shows the confusion. The Second Circuit, for example, has used the concept of the hypothetical "competent attorney." *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). A district court in the same case relied on the doctrine of "marginal frivolity." *Eastway*, 637 f. Supp. 558, 581-82 584 (E.D.N.Y. 1986). On the other hand, in *Rodgers v. Lincoln Towing Service, Inc.*, 596 F.Supp. 13, 27-28 (N.D. Ill. 1984), another district court simply took judicial

notice of proper attorney conduct, while a fourth court, in *O'Rourke v. City of Norman,* Civ. No. 85-01-B (W.D. Okla. July 18, 1986) (slip op.), used an approach that might be called "stop, look, and listen."

None of these approaches means the same thing. Each is a piece of gossamer reasoning useful only as evidence of the general confusion. Some judges believe they know how any lawyer—no matter his speciality or client—should act. Others do not. Some courts will listen to excuses and explanations. Others will not. In a given case, a lawyer cannot confidently predict the standard to which he will be held.

There is another kind of substantive confusion under Rule 11 afflicting both courts and lawyers. The question is fundamental. If the court objects to a claim, allegation, or brief, who gets sanctioned? The lawyer or the client? A lawyer may have grilled his client and associates endlessly about the basis for an allegation but simply have been misled. The client may have suppressed information. How does a court decide, and what are the consequences?

Rule 11 provides no guidance. Obviously, to determine who is at fault, the court must inquire into the facts. This can place the lawyer directly in conflict with his client. It can jeopardize the attorney-client privilege. Will a lawyer have to blow the whistle on his client? Given the privilege, can he do that even if he wants to?

It is true that Rule 4-101 of the ABA Model Rules of Professional Conduct permits an attorney to reveal confidences when faced with disciplinary action or a need to defend himself. But this standard is permissive, not mandatory. This means—especially when sanctions are likely to be slight—that an attorney will have a strong inducement to take the fall for his client. The alternative (and the necessity in cases in which sanctions might be severe) involves the client having to retain independent counsel to represent himself against his attorney in satellite litigation. Both situations are unpalatable.

Variable substantive standards are not the only problem. The procedures for imposing sanctions under Rule 11 vary from the nonexistent to the inadequate. This stems in part from the Advisory Committee notes on the rule. The notes specially recommend that sanction proceedings be limited in scope to avoid ancillary litigation. The recommendation is myopic and unfair.

Remember what can be at stake. A sanctioned attorney's reputation may be dented or seriously harmed. The lawyer even may be referred to a local disciplinary committee. Also, the sanction may involve a lot of money. It is no small thing to bear a $5,000 or $10,000 fine personally, and Rule 11 fines have gone higher—up to as much as the $250,000 sanction reversed in *Yagman v. Brown,* 796 F.2d 1165 (9th Cir. 1986).

The Issues Are Foreign

Consider also the circumstances that may lead to sanctions. A federal trial judge finds himself presiding over a complicated case involving legal issues that are unfamiliar to him. It is one of 80 active cases he is handling. He knows nothing about the personal byplay between the parties and their lawyers. He may know the basis for the suit and even some of the operative facts, but at best, he has seen only a tiny slice of the jousting and game playing that make up the lawsuit.

Against such a background, this overburdened trial judge finds himself confronted by a motion, objection, or complaint that seems particularly unjustified. He may be unaware of the litigation's nuances that would make the action seem more reasonable. All he knows is that someone is wasting his very limited time. That by itself may be enough to produce sanctions, with little notice and no futher factual inquiry.

There simply must be better procedures before sanctions are imposed. A judge considering action under Rule 11 obviously must determine if a lawyer has made the required reasonable prefiling inquiries. More than that, the judge must consider

whether, based on the inquiry made, the lawyer could legitimately certify that the filing was well-founded.

These are not easy determinations. Often they depend on facts not in the record. Given the issues defined by the rule, it is impossible for a judge to impose sanctions without taking evidence and, very often, without conducting a hearing. The kind of abrupt action in cases like *Roberts v. Ace Hardware, Inc.*, 779 F.2d 52 (6th Cir. 1985), and *Rodgers* cannot be justified.

Sound procedures are needed for more reasons than just careful fact-finding. What is involved are basic considerations of fairness, even of due process. The intent of Rule 11 is deterrence and punishment. In fact, the rule can be more severe than most criminal statutes, since it can support severe penalties even when the lawyer had no evil or malicious intent.

Basic Due Process

All this means that lawyers faced with punishment under Rule 11 should be afforded basic due process. Like other sanctions, punishment under Rule 11 should be preceded by fair notice and an opportunity to present facts in opposition to sanctions.

Fortunately, some courts have begun to see the light. A few, properly, have said that a Rule 11 punishment of lawyers is arguably a quasi-criminal proceeding and analogous to contempt proceedings. *Eavenson, Auchmuty & Greenward v. Holtzman*, 775 F.2d 535, 544 (3rd Cir. 1895). Other circuits, relying on Rule 46(e), Fed. R. Civ. P.; Rule 42(a), Fed. R. Crim. P.; and principles of fundamental fairness require some minimum level of due process; they insist that the district court observe the procedures mandatory in criminal contempt proceedings. See *Cotner v. Hopkins*, 795 F.2d 900 (10th Cir. 1986), and *Donaldson v. Clark*, 786 F.2d 1570, 1577 (11th Cir. 1986).

Unfortunately, this salutary appellate trend is not uniform. It finds only a feeble reflection in the district courts. Notice of

sanctions sometimes is given only by the sanctions themselves. Decisions are rendered without a hearing. Justifiable anger toward those few attorneys who engage in abusive and dilatory action has, in some districts, been unleashed on the whole legal community without any ascertainable standard or meaningful procedure.

The time has come to say that practice under Rule 11 is a mess. The Advisory Committee may say that the new rule should not chill lawyers' enthusiasm, advocacy, or creativity, but that is wishful thinking. The random and inconsistent application of the rule in fact freezes creativity. It can make the lawyer a judge placater instead of a client advocate. More than that, it creates a perilous dilemma. On the one hand, lawyers are ethically bound to present all nonfrivolous arguments on behalf of their clients' interests. On the other hand, the line between frivolity and acceptable representation—and the risk of sanctions—varies from judge to judge.

Judges always must remember the precarious balancing act that lawyers perform. Judges cannot forget the realities of trial practice. The standards and procedures for imposing sanctions must be consistent and identifiable. If not, costly, tedious ancillary litigation will continue, and the tension between lawyers and judges will increase unnecessarily.

The point of studying the judge is not to map the corners to be cut. The aim is not to see how much you can get away with. Instead, the purpose is to know what you face. You need to guard against unexpected problems. Unfortunately, Rule 11 makes a judge more than a legal arbiter or trier of fact. It makes him a potential opponent, and that is a sad result of a rule whose intent was to improve the quality of practice in the federal courts.

There is an even more important way to guard against Rule 11 sanctions: Assume a very low frivolity threshold and no procedural protections, and then do what the rule mandates.

Analyze with care each paper you file. Conduct the required reasonable prefiling inquiry. Think carefully when you sign a filing; remember what the signature means.

There are practical steps you should take to fulfill these obligations. Whenever possible, interview your client personally. Examine the relevant documents and witnesses if they are available. Do all this before you file.

The point about a client interview bears emphasis. It is easy and natural to take a client's story at face value. You want to help. You want the work. But client's stories have to be probed. Putting aside the unique considerations involved in criminal defense work, a client who wants a complaint or motion filed should be subjected to a cordial cross-examination. The duty of zealous representation requires lawyers to be advocates, not parrots. If you cannot or will not push your client's version of the facts, litigation may be the wrong line of work for you.

It is equally important to know the law before you file. Taking wrongheaded positions about certain basic legal questions—jurisdiction, venue, and the statute of limitations—is a one-way street to sanctions.

Likewise, do not march into unfamiliar legal terrain without a road map. Tax lawyers, for example—despite their powers of analysis—should not, untutored, file admiralty actions. If a client walks in with a problem on which you are not an expert, first consider referring him to a specialist. If you choose not to do that, at least get an opinion from an expert. Select your expert with care. For Rule 11 purposes, relying on an ignorant specialist is as bad as relying on your own ignorance.

A final point on legal matters: Be clear and honest about what you are doing legally. If you are advocating a change in the law, say so explicitly. Rule 11 does not bar good faith efforts to change the law. But using Rule 11, a court may well sanction an attorney who seeks a legal change but presents it as a statement of settled law.

There is a final step to be considered in following Rule 11, especially in cases in which the defendant has control of critical documents or witnesses. This is a particular concern in employment litigation. Your client genuinely may believe he has been done wrong at work. People are not inclined to admit job deficiencies, and employees sometimes cannot know the whole picture at a big company. How do you guard against the possibility that the employer will later pull out a sheaf of personnel documents that makes your client's case look like a fantasy?

The solution is simple but runs against the grain: Send the prospective defendant a copy of the complaint before filing. Ask what the company thinks. Invite a rebuttal. This may be alien to the ambush mentality of many litigators. But coupled with a reasonable preliminary inquiry, it can powerfully protect against sanctions. If, as is usually the case, the response to your inquiry is silence or outraged, factless sputtering, it will be hard for a judge to say you fell short in preliminarily probing the soundness of your claims.

A warning: If the defendant does respond and provides a preview of its defense, study it carefully. After all, your client may be wrong. On the other hand, the prospective defendant's response may be slanted or partial. Tough choices—created by the tension between client loyalty and Rule 11—may confront you.

Unfortunately, there is no answer to the Rule 11 dilemma right now. All the protective work in the world may seem insignificant to a busy judge unpersuaded by a claim or an argument. There is only one good answer for the future: Rethink Rule 11. Define the standards it imposes. Specify the procedures it requires. And end the uncertainty over sanctions that divides lawyers and judges.

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ABA Journal — May 1, 1988

SANCTIONS

RULE 11 IS ONLY THE BEGINNING

By Gregory P. Joseph

Rule 11 occupies center stage whenever sanctions are discussed, and for good reason. It inaugurated the era of mandatory sanctions and introduced a new, objective standard that is indifferent to the subjective mental state of an alleged offender. The rule has been both vigorously and unevenly applied and, for those reasons, has stimulated a good deal of concern. But if Rule 11 is the focus of the whirling debate about sanctions, it is only the beginning of the story.

Because Rule 11 of the Federal Rules of Civil Procedure is so widely touted, it is easy to lose sight of the fact that its scope is actually quite limited. The rule only applies to misconduct relating to the signing of a pleading, motion or other paper that is not well-grounded in fact and law. No other behavior is sanctionable under Rule 11. *United Energy Owners Committee Inc. v. U.S. Energy Management Sys. Inc.*, 837 F.2d 356 (9th Cir. 1988).

Furthermore, Rule 11 applies only to signatures affixed to certain documents—specifically, a civil litigation filing in federal district court. Papers filed on appeal, in criminal cases, in bankruptcy actions and a multitude of other proceedings—not to mention all state court filings—are outside the rules. Fed. R. Civ. P. 1, 11, 81; *Brown v. Capitol Air Inc.*, 797 F.2d 106, 108 (2d Cir. 1986).

Even in the limited class of cases to which it does apply, Rule 11 sometimes does less than meets the eye. In some circuits, for example, Rule 11 sanctions cannot be imposed against a lawyer who files papers in bad faith if those papers are well-grounded in fact and law. Objective merit excuses malicious intent in these courts. See *Rachel v. Banana Republic Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987).

If Rule 11 has holes in it, though, judges have plugs. Sensitized to the utility and impact of sanctions, courts have scoured the shelves for the power to punish when Rule 11 is inappropriate. Many statutes, rules and common law sanctions that have been on the books for years are only now coming into their own in the growing jurisprudence of sanctions.

Section 1927 (28 U.S.C. § 1927) is aimed directly at lawyers, who ignore it at their peril. It provides that any attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."

Before the 1983 amendment to Rule 11 and all of the attendant publicity on litigation abuse, virtually no one knew that Section 1927 existed. Although it had been in force since 1813, it was rarely invoked (only seven reported decisions in its first 150 years). Even after Congress in 1980 amended Section 1927 to encourage awards of attorney fees to curtail vexatious litigation, the statute was largely ignored. Since the courts' discovery of the amended Rule 11, however, Section 1927 has been rediscovered—with a vengeance.

The virtue and danger of Section 1927 lies in its breadth. While it applies only to lawyers, it embraces everything done in federal court. Unlike Rule 11, Section 1927 is not limited to federal district court civil litigation. All cases and all proceedings are covered. See *In re Ginther*, 791 F.2d 1151 (5th Cir. 1986) (appeals); *State of Wisconsin v. Glick*, 782 F.2d 670 (7th

Cir. 1986) (criminal cases); *In re Usoskin,* 56 Bankr. 805 (Bankr. E.D.N.Y. 1985) (bankruptcy proceedings). All types of multiplicative misconduct—acts and omissions beyond the signing of court papers ill-grounded in fact or law—are prohibited. As a result, the statute fills many of Rule 11's gaps.

For example, if a court paper satisfies Rule 11 when a lawyer signs it, he has no obligation under Rule 11 to correct or withdraw that paper even if he later learns that it is utterly baseless. *Thomas v. Capital Sec. Serv. Inc.,* 836 F.2d 866 (5th Cir. 1988) (en banc). A judge displeased with that sort of behavior may well turn to Section 1927.

Under that statute, sanctions may be imposed for persisting in a position or prosecuting a claim after it becomes clear that the position or claim is unfounded. *Dreiling v. Peugeot Motors of America Inc.,* 768 F.2d 1159 (10th Cir. 1985).

While there are any number of issues lurking about Section 1927, one question is especially important: whether bad faith is an essential element of a Section 1927 violation. The statute speaks in terms of proceedings that have been multiplied "unreasonably and vexatiously."

Some circuits hold that a clear showing of bad faith (vexatiousness) must be made in addition to a showing of objective unreasonableness. *Oliveri v. Thompson,* 803 F.2d 1265 (2d Cir. 1986), cert. denied, 107 S.Ct. 1373 (1987); *Ford v. Temple Hospital,* 790 F.2d 342 (3d Cir. 1986). Other circuits apply a purely objective standard and dispense with any bad-faith requirement. *Coleman v. Comm'r,* 791 F.2d 68 (7th Cir. 1986). Yet others have noted but not decided the issue. *O'Connell v. Champion Int'l Corp.,* 812 F.2d 393 (8th Cir. 1987). At present, whether specific conduct is sanctionable under the statute depends in part on the forum in which it occurs.

Frivolous appeals. While Section 1927 provides one vehicle to sanction frivolous appeals, it also carries some baggage. In

addition to the unsettled question about bad faith, Section 1927 authorizes sanctions against lawyers only. Parties, pro se litigants, paraprofessionals and all others are beyond its reach, even though any of these may be partly responsible for the prosecution of a frivolous appeal. *Westmoreland v. CBS Inc.*, 770 F.2d 1168 (D.C. Cir. 1985).

To reach a broader range of wrongdoers, courts imposing appellate sanctions rely most frequently on Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1912. Under these provisions, which are substantially identical, a court of appeals may award "just damages"—which includes attorney fees—if an appeal is frivolous. Because the rule and the statute are redundant, courts tend to cite only the rule.

Under Appellate Rule 38 and Section 1912, an appeal is frivolous when the result is obvious or the arguments are wholly without merit. *Natasha Inc. v. Evita Marine Charters Inc.*, 763 F.2d 468, 473 (1st Cir. 1985).

Bad faith is not an issue because the standard for the imposition of sanctions is an objective one. The subjective mental state of the person sanctioned need not be considered. *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192 (7th Cir. 1987).

The persons sanctionable, moreover, include anyone responsible for filing the frivolous appeal. Lawyers, parties, pro se litigants, criminal defendants—anyone culpable—may be the target of the sanctions award. *Stelly v. Comm'r*, 761 F.2d 1113, 1116 (5th Cir.), cert denied, 474 U.S. 851 (1985).

Sanctions are discretionary under Appellate Rule 38 and Section 1912. In deciding whether appellate sanctions are appropriate, courts usually focus on the frivolousness of the arguments presented. If the arguments are found to be utterly meritless (the standard for judging an appeal "frivolous"), the court is likely to conclude that the offender has pursued his appeal in bad faith. *Spiegel v. Continental Illinois Nat'l Bank*, 790

F.2d 638 (7th Cir.), cert. denied, 107 S.Ct. 579 (1986). When bad faith is present, sanctions may be obligatory. *Autorama Corp. v. Steward,* 802 F.2d 1284 (10th Cir. 1986).

In this backdoor fashion, both bad faith and mandatory sanctions creep into appellate sanctions decisions, even though neither is an element under Appellate Rule 38 or Section 1912.

The murkiest, and most extensive, power to sanction derives from the inherent powers are those "necessary to the exercise of all others." *Roadway Express Inc. v. Piper,* 447 U.S. 752, 764 (1980). They derive from the "control necessarily vested in courts to manage their own affairs," but are not conferred or "governed ... by rule or statute." *Link v. Wabash R.R.,* 370 U.S. 626 (1962).

The inherent power to sanction is staggeringly broad. It applies to all proceedings, and no one is exempt from its reach. Contempt power is rooted in the inherent power of the judiciary. *Levine v. United States,* 362 U.S. 610 (1960). So, too, is the power to dismiss for failure to prosecute. *Link v. Wabash R.R.*. Among other things, a court may draw on its inherent power to:

► Award attorney fees to a prevailing party where the loser has commenced or conducted litigation "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240 (1975).

► Disbar, suspend or reprimand counsel. *Eash v. Riggins Truck Inc.,* 757 F.2d 557 (3d Cir. 1985).

► Disqualify counsel. *Kleiner v. First Nat'l Bank of Atlanta,* 751 F.2d 1193 (11th Cir. 1985).

► Dismiss an action or enter a default judgment for violation of court orders or applicable rules. *Donaldson v. Clark,* 819 F.2d 1551 (11th Cir. 1987).

► Vacate a final judgment for fraud on the court. *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5 (1st Cir. 1985).

The inherent power to sanction is the consummate gap-filler. If the court deems punishment appropriate and no rule or statute provides the needed muscle, the court may well turn to its inherent power. The injunctive restraints imposed on abusive litigants are illustrative.

In this era of rampant litigiousness, thoroughly spurious cases frequently are filed. Some particularly abusive litigants bring them repeatedly. Many courts have faced pro se litigants and other parties who have spent years filing groundless lawsuits. In these extraordinary circumstances some courts have used their inherent powers to enjoin or restrict further litigation by the offenders.

In some cases, the injunctions have barred further litigation concerning the claim already adjudicated. *DeSilvestro v. United States,* 767 F.2d 30 (2d Cir. 1985). Others have gone further, restricting the commencement of any future litigation by the repeat offenders. In *Lysiak v. Comm'r* 816 F.2d 311 (7th Cir. 1987), for example, the 7th Circuit ordered that all future appeals filed in that court by a specified appellant be stayed immediately—and all briefing held in abeyance—until the appellant had satisfied the court that his claim was colorable.

Even more drastically, in *Uban v. United Nations,* 768 F.2d 1497 (D.C. Cir. 1985), the D.C. Circuit enjoined a pro se litigant from filing any civil action in any federal court without first obtaining leave of the forum court. In seeking leave, the litigant was required not only to certify the bona fides of his claim but also to present the court with a copy of the D.C. Circuit's injunction against him.

The principal limitation on any court in imposing inherent power sanctions is the general requirement that a finding of bad faith is a prerequisite to imposition of a sanction.

At least one court of appeals, however, has suggested that a lesser standard may be appropriate when counsel, rather than the client, is the offender. *McCandless v. Great A & P Tea Co. Inc.*, 697 F.2d 198 (7th Cir. 1983).

Section 1927, Appellate Rule 38, and inherent power are three principal sources of sanctions powers supplementing Rule 11. But they are by no means the only supplemental powers to which the courts turn.

Discovery abuse. The topic is familiar. Fed. R. Civ. P. 37 has furnished a discretionary source of sanctions powers for decades.

However, the 1983 amendments to the rules that ushered in Rule 11 also introduced Rule 26(g). In effect, Rule 26(g) applies the strictures of Rule 11 to all discovery requests, responses and objections.

If a discovery paper is not warranted by the rules or existing law, if it is filed with an improper purpose or is "unreasonable or unduly burdensome or expensive," mandatory sanctions are triggered. While Rule 26(g) has largely been overshadowed by Rule 37 in practice, it presents fertile ground for the next generation of mandatory sanction litigation.

In addition to Rules 26(g) and 37, Fed. R. Civ. P. 30(g) (2) also supplies a remedy for a specific form of discovery abuse. It provides for an award of attorney fees to reimburse parties attending a deposition if a witness who was not subpoenaed fails to appear. While limited in scope, it is not infrequently applied.

Other pretrial sanctions. Several rules and statutes authorize or require the imposition of sanctions for various other forms of pretrial misconduct. For example, Rule 16(f), another 1983 innovation, mandates that attorney fees, at least, be awarded if a party or counsel fails to obey a scheduling or pretrial order, fails to attend a scheduling or pretrial conference, or attends the conference but is "substantially unprepared" to participate in it, or simply fails to participate in it in good faith.

Innovations aside, several provisions that for years have permitted the imposition of sanctions are now actually being used for that purpose. These include Fed. R. Civ. P. 41(b) (d) (involuntary dismissal and assessment of costs for failure to prosecute or to comply with the rules or any order of court); Fed. R. Civ. P. 45(f) (contempt for noncompliance with subpoena), Fed. R. Civ. P. 55 (default judgment), and Fed. R. Civ. P. 56(g) (contempt, costs and attorney fees as a sanction for filing affidavits in bad faith on a motion for summary judgment).

The statutory bases for sanctions orders are increasingly being implemented. These include 28 U.S.C. § 1447(c) ("just costs" may be ordered for "improvident" removal of state court action to federal court); 15 U.S.C. § 1117(a) (attorney fees awardable in Lanham Act case if losing party acted in bad faith); 26 U.S.C. § 6673 (allowing the Tax Court to award up to $5,000 in damages whenever proceedings before it have been instituted or maintained by the taxpaper primarily for delay or where the taxpayer's position is frivolous); 26 U.S.C. § 7482(c)(4) (authorizing the courts of appeal and the U.S. Supreme Court to impose damages for any frivolous appeal from a Tax Court decision); 42 U.S.C. §§ 1988 and 2000e-5(k) (as construed, attorney fees may be granted to a prevailing defendant in a civil rights action only upon a finding that the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christianburg Garment Co. v. EEOC,* 434 U.S. 412 (1978) (construing §§ 2000e-5(k)); *Glass v. Pfeffer,* 657 F.2d 252 (10th Cir. 1981) (construing § 1988). There is also, of course, general contempt power, both civil and criminal (18 U.S.C. §§ 401-402).

Rules, too, are proliferating beyond the Federal Rules of Civil Procedure. Bkcy. Rule 911, Tax Ct. R. 33(b), Sup. Ct. Rule 49.2 and numerous local federal court rules bring Rule 11-like analyses to bear on attorney and litigant behavior. In addition, the states have enacted dozens of rules and statutes authorizing sanctions.

Judge George Pratt of the 2nd Circuit has noted that we have entered a new "Era of Sanctions" but lack "an integrated 'code' of sanctions to supply coherent guidance." *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987) (Pratt, J. dissenting); *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986). This observation identifies a real problem, one that is exacerbated as additional sanctions powers are being continually discovered.

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APPENDIX C

U.S. Constitution, Amendment V

Captial crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

28 U.S.C. § 1927 as amended

§ 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Federal Rules of Civil Procedure

Rule 11: Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable in-

quiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 26: General Provisions Governing Discovery

(c) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they the appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agrement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference,

the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) Signing of Discovery Request, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an approporate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, made with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party upon whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not

in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits

caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 59. New Trials; Amendment of Judgments

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion To Alter Or Amend A Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

* * * * *

Rule 77. District Courts and Clerks

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notive of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

Rule 54. Judgments; Costs

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereaffer, the action of the clerk may be reviewed by the court.

Local Rules, United States District Court
Eastern District of Missouri

Rule 30

In the case where a party is entitled to an award of attorney's fees, regardless of whether said entitlement has its source in a contract or a statute, said party shall file a claim for attorney's fees no later than twenty-one (21) days after entry of judgment on the merits. Whenever a party files a claim for attorney's fees within the twenty-one (21) day period, the judgment on the merits shall be deemed final until the District Court has ruled on the claim for attorney's fees. The purpose of this rule is to encourage consolidated appeals of judgments on the merits and claims for attorney's fees, and to avoid piecemeal appeals.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 82-950 C

Court No. 6

Jack D. Bastien, et al.,
Plaintiffs,

vs.

R. Rowland & Co., Inc., et al.,
Defendants.

AFFIDAVIT

On or about October 11, 1980, I met with Mr. Arthur O'Hare and Jack Bastian. They came to see me regarding the ninety (90) day letter they had received from the Internal Revenue Service. There was approximately two (2) weeks before the end of the ninety (90) day period.

I discussed with them the fact that at the end of the ninety (90) day period they must either pay the money to the Internal Revenue Service or file a protest. They asked me to investigate the possibility of success if they should file a protest within the Internal Revenue Service. They also suggested I talk with certain other investors who apparently also had talked with the law firm of Thompson and Mitchell.

While the clients were in my office on that day, I did talk with a Mr. Donoway who was an investor in the Antares Partnership. He gave me the name of Donald Doerge who had formerly been an officer of R. Rowland & Co., and was presently the successor general partner for Antares. I was also advised he was still here in St. Louis and working as an officer at another

brokerage firm. I contacted Mr. Doerge on the following Monday and also contacted Mr. David Wells. He had the documents of Antares that had been obtained from the general partner, Mr. Rand. David Wells said I could look at the documents if Mr. Donoway gave my approval.

That afternoon, I met with Dr. David Wells and he did permit me to make an examination of the records of the Antares Partnership at his office—I put paper clips in order to xerox copies of a number of documents. This is where I first noticed the cancelled checks, in fact, there were two (2) checks made payable to the Schwartzman law firm, one for $15,000.00, another for $20,000.00.

The next few days I had several conferences with the IRS agent who had been in charge, locally, of the Antares audit. He gave me the name of Bill Falk who was counsel for the District Director. Mr. Falk advised me that Harrowood had already filed a case in the Tax Court and he would send me a copy of the petition. I received from the Internal Revenue a copy of the IRS audit report. I proceeded to research the various elements in connection with the legal issues involved; that the partnership was for profit and the question of separating the limited partners from that of the general partner relating to the issue whether or not there was a profit motive. Mr. Bastian and Mr. O'Hare stated that they were told that there would not be any profits for two or three years and that afterwards there would be profits which would be offset against their depreciation. They were also told that they had a right to investment credit deduction.

I had another conference on October 21, 1980 with the clients-explained to them various problems going to the Tax Court versus paying the assessment and eventually filing a claim for refund and filing suit in the Federal District Court. My associate in the office at that time, Douglas Pedersen, and I worked together on various aspects of the research and I had

conferences with I think the accountants for several of the investors and we prepared a draft of a memorandum for the conference on October 27, 1980 with the clients. At that point, I was advised that the clients should pay rather than file a protest with the Internal Revenue. It was decided that this would give us an opportunity to see what was occurring in this particular area with the other investors and apparently with other limited partnerships. Our office was authorized to proceed to study the possibility of security violations. Mr. Bastian and Mr. O'Hare had attended a meeting in August, 1980 in which Mr. Donald Doerge had stated that Rowland & Co. did not perform any due diligence before offering the limited partnership interest to the public, that the motion picture did not cost the partnership more than $10,000 or $15,000.

We proceeded to investigate the question of statute of limitations and I had other conferences with the Internal Revenue Service and proceeded with the research of various issues involving the security violations. I had met a Charles Locke, attorney who had advised me he had dealt with abusive and fraudulent tax shelters while in the Internal Revenue Service. He reviewed all the documents we had received from Thompson and Mitchell and documents received from our clients. He advised Mr. Peterson first and then myself that it was a clear case of fraud in his opinion. We had also received names of other limited partnerships and documents thereof from Donald Doerge. This was a key factor in Mr. Locke's analysis. It was also his opinion that the legal opinion of Mr. Schwartzman was inaccurate as to the legal conclusions and did not apply to the individual tax shelters to which the opinion was attached, Statements as to Income Forecasting was contrary to the Rev. Rulings; also, investment credit could not be deducted because there was no United States money used in production of the films.

On November 17, 1980 I had another meeting with Mr. O'Hare and Mr. Bastian and we went over the memorandum we had prepared on possible S.E.C. and fraud litigation. Mr.

O'Hare and Mr. Bastian did not wish to proceed unless other investors joined. Mr. O'Hare and Mr. Bastian advised other investors to contact our office.

We decided to set up a meeting with the other investors and I had phone conversation with Donald Doerge. He stated that he would appear at the meeting on December 13, 1980 and he would bring some papers to my office before that time.

I had numerous conferences with Mr. Peterson in connection with the research and preparation of memorandum to be prepared for the December 13, 1980 meeting at the MAC. We did research in connection with the prospectus and the legal issues involved in connection with Reliance-ommissions-fraud on the market place, 10 b-5 violation and Public and Private offerings.

On December 13, 1980 a meeting was held with investors and representatives of the investors at the M.A.C. from 9:00 a.m. to 12:00 p.m.. Mr. Doerge explained that R. Rowland & Company did not use due diligence, that the motion pictures only cost anywhere from $10,000.00 to $15,000.00-that the "Brokers Use Only" memorandum were sales gimmick and was used to impress the investors and violated S.E.C. Regulations.

I had a telephone conference on December 16, 1980 with Mr. Donald Doerge-he explained to me the commission arrangement of 10% plus 2½% for due diligence. He stated that the due diligence was never used for due liligence but was used for other purposes for the benefit of R. Rowland & Company. No mention of Commission Rate was set forth in the offering material.

Had meetings and conferences with other investors and also attorneys for other investors. The other investors that I talked with all had the same story-that is, they were sold the investment on the basis that they would lose money for two or three years but then the motion picture would make some money. They

were also told that the film was similar to the movies, Shampoo or French Connection. They were also provided with "For Brokers Use Only" memorandum-several of them did not see the confidential offering material or prospectus until the date they signed or after they had signed and issued their checks.

I had initial contact on the telephone with a Robert Tschudy on December 19, 1980. Continued to have additional conferences with various other investors and with accountants and lawyers for certain other investors.

On January 8, 1981 I had a phone conference with Leonard Vines who agreed to assist me. Also, made some inquiries as to the accounting firm of Laventhol & Horwath.

I continued to have conferences with various other investors and investors representatives, and also had an additional conference with Donald Doerge on January 27, 1981.

Mr. Locke suggested I check on the Panama Canal Corporation since he said this was a familiar device in these connections to have Panama Canal, Nassau, Liechtenstein Corporations as sellers. He also pointed out that the prospectus had a great deal of half truths, partial disclosures. He suggested that the legal opinion should be examined because the legal opinion of Mr. Schwartzman did not clearly reflect a true picture of the application of the Income Forecasting method of depreciation. He also advised that income forecasting was a standard method of depreciation used by abusive tax shelters as well as fraudulent tax shelters. He also advised to check in and obtain a prospectus from a registered motion picture limited partnership to compare as to what the offering material should disclose. He also suggested the economic forecast was omitted in the prospectus and also omitted was the amount of funds to be paid for promotions, the amount of money to be paid for underwriters, brokers. He suggested also that by applying figures and following through on the distribution agreement and the statements as to the amount of gross income needed to repay the non-recourse

note appeared to him not to be correct. It was his opinion that it was worth pursuing, since it appeared to him to be a clear fraud situation.

We continued to develop our memorandums and theories regarding liability of brokers, liability of accountants and attorneys. We used as a basis the case of *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), *Blackie v. Barrach,* 524 F.2d 891, 906-07 (9th Cir. 1975). These cases were important because of the exception to the reliance issue imposed upon investors. Neither Mr. O'Hare or Mr. Bastien and other investors that I had talked with, including Dr. Burt, had actually seen the prospectus prior to the time that they paid their money.

We also reviewed well-known cases such as: *Chris-Craft Industures, Inc. v. Bangor Punta Corp.,* 426 F.2d 569 (2nd Cir. 1970) and *Ernst & Ernst v. Hochfelder,* 96 S. Ct. 1375 (1976). We also used for study purposes the well-known case of *Escott v. Barchris Construction Co.,* 280(d) F.Supp. 643 (S.D.N.Y. 1968). Also reviewed and studied were the two well-known cases cited in law review articles of *Rochez Brothers v. Rhoades I & II,* 491 F.2d, 402, 405-06 (3rd Cir. 1974; 522 F.2d 880, 884-5 (3rd Cir. 1975).

We also included in our study the case of *Myzel v. Fields,* 386 F.2d 718 (8th Cir. 1967) and *Nye v. Blyth Eastman Dillon & Co.,* 588 F.2d 1189, (8th Cir. 1978).

Included in our study in connection with the statute of limitations problem we did examine the 8th Circuit case of *Vanderboom v. Sexton,* 422 F.2d 1223, 1240-41 (8th Cir. 1970) as well as *Morris v. Stiefel, Nicolaus & Co.,* 600 F.2nd 138 (8th Cir. 1979).

I had a number of conferences with Donald Doerge in which he stated he had had a number of conferences with a Mr. Frank Johnson who had shared office with R. Richard Davis. Davis was the promoter of the Florida Partnerships of which Antares

was one of the limited partnerships. It was Mr. Doerge who also pointed out that there was a group of films purchased from a New York group, Shapiro & Cohen. He advised me that Henry Schwartzman and his law firm were the attorneys for both groups and that Laventhol & Horwath, International Accounting Firm, were the accountants. He provided me with names of other Limited Partnerships and investors.

After David Wells permitted us to examine the documents of the Antares held in his possession, we saw letters by the distributors which placed future income of Antares at a couple of thousand dollars. This lead us into a research area regarding income forecasting and the fact that the K-1's issued by Laventhol & Horwath were taking the total amount of the depreciation based upon the cash value plus the non-recourse notes. The regulations would have prevented it because the forecast for the income for the life of the film was only about $2,000.00. This formed a basis for liability against Laventhol & Horwath as well as the general partners who permitted the accountants to issue the K-1's.

As we were able to observe other offering materials and other audit reports we followed the trail used by the Internal Revenue Service. According to the terms of certain distribution agreements as the income increased, distribution to the partners decreased.

We also made other calculations there which did not seem to fit properly. As other investors like Dr. Burt and Tschudy and Arla Reed signed contracts with us we were able to obtain their documents and this helped verify the fact that this was more than just a single sale of limited partnership interest.

As various documents came into the office one of the interesting facits was that the investors were not advised that the partnership interests were being sold on a nationwide basis.

Upon examination of the law, we concluded that Mr. Locke was correct that the investment tax credit would not apply

because apparently the films were made in Europe and there was no United States money invested. As I had my initial phone conversations with Mr. Frank Johnson who lived in Florida, he also verified the films sold were all coming in from Europe.

It was also not disclosed to the investors that the working capitol would be under stated. We had the opportunity to examine the checks in Antares. After Mr. Rand, general partner, paid out all the checks on one day, there was about $1,600.00 left. This was contrary to the statement in the offering material which showed there would be at least $7,500.00 left as working capital. In 1975 and 1976 Mr. Rand was asking the investors to pay additional money to the accountants so that the K-1's could be provided.

We noticed that the actual amounts that the organizers, general partners were receiving from the other partnerships was not stated in the offering material of Antares, nor was it stated in the offering material of Cypress after Dr. Yager came into the office. In examining the offering material of the New York partnerships, it appeared as if they were all essentially the same, all prepared by Mr. Schwartzman's firm. The offering material of New York partnerships also did not state what Shapiro and Cohen received from the other limited partnerships.

We eventually went to Jefferson City and examined the files of the Missouri Security Commission. We found these documents had been filed with them regarding commissions and other matters. The representation made was that the commissions would be 10% and it appeared as if there were written contracts between the limited partnerships and Rowland. There were also indemnity agreements not mentioned in the offering material. Donald Doerge advised us that Rowland had the exclusive territory here in St. Louis metropolitan area and that another broker had the Kansas City area.

Around January 1982, we obtained a copy of the Delphi Film Associates which was a limited partnership formed to par-

ticipate in the production, ownership and explortation of feature length motion pictures. The most publicized picture in the portfolio was "Annie". We compared the information and disclosures in Delphis with the information in the various prospectus from the limited partnerships of our client. We were able to observe a number of matters which were clearly set out in the Delphi and which were not fully disclosed in the client's limited partnership.

a) The selling agents would be reimbursed for time and expenses up to a maximum of $275,000.00. Not disclosed in our matter.

b) Proceeds from the sale of units would be held in escrow and would draw interest and if an insufficient number of subscribers were not obtained, the funds would be returned, together with interest, from escrow agency. Not disclosed in our matter.

c) It also pointed that certain expenditures for advertising and promotion of the films would be borne by the partnership and the intention to borrow funds and the amount of money to be used in connection with the advertising and promotion of the film. Not disclosed fully.

d) The partnership is formed under the New York Uniform Limited Partnership Act and that the limited partner holds as trustee for the money paid to his account. Not disclosed.

e) The selling agent's fee for placing the units would be 8% of the gross proceeds for the sale of units and would be due and payable upon the admission to the partnership with the limited partnership. Not disclosed.

f) The selling agents could enter into agreements with other broker dealers to offer either for sale on a best effort basis and that each selling agent who participated would be deemed an "underwriter". Not disclosed.

g) The general partner and partnership agreed to indemnify the selling agent and certain other liabilities, including liability arising under the Security Act of 1933 and State Security Law. Not disclosed.

h) The distributor was to be Columbia Pictures and the distribution agreement is completely set out in the prospectus. Only a summary set out.

i) An entire two pages is taken up explaining investment tax credit and the fact that the investment tax credit only applies to that portion of the production cost which qualify as United States production costs. It also clearly sets out that that portion that does not qualify as United States production cost cannot be deducted. Not disclosed.

j) It also points out that investment tax credit could be allocated to a portion to the distributor as well as to the partnership. Not disclosed.

k) It clearly sets out to the investors should consider the state and local tax laws in regards to the investment. Not disclosed.

One of the interesting aspects was the Delphi's extensive information disclosure regarding the *copyright of the films.* No disclosure or mention of copyright of film.

A study of the confidential offering material provided to the investors in this matter showed that the general statements made without specifics regarding the commission and finders fees to be paid. No disclosures were made as indemnity agreements.

There was no disclosure as to what was going to be done about obtaining the copyright with the partnership. In the documents of Antares, that we received from Thompson & Mitchell, we found the acquisition agreement. The acquisition agreement showed that of the total sales price, $50,000.00 was allocated as the cost for the copyright.

Mr. Johnson indicated to me in our telephone conferences that it was an easy matter for the general partners and organizers to determine the fair market value of the motion pictures as they were imported into the United States. The offering material merely states that the sellers refuse to disclose what they paid for the film. That a value had to be placed upon each film as they entered the United States. He stated that Henry Schwartzman was an expert and knew about this. Mr. Davis had told him that Mr. Schwartzman told him not to worry about that as no one would ever think of looking at the import valuations placed upon the films. Also, Mr. Johnson stated, that the records would show that no insurance was ever put on any of these films.

In my conversations in 1982 with the Internal Revenue Service and the attorneys representing the Internal Revenue Service in preparation of their trial of the Deegan case, I mentioned the fact that copyrights may not have been obtained. I pointed out to them what I had been told about the value placed on the films when imported and that apparently no one checked that, and the fact that these films had not had any insurance. It is interesting to note that in the Deegan case, the Tax Court's opinion, makes reference that the promoter, Shapiro/Cohen, never did obtain copyrights, never did check the import papers to determine what the fair market value placed upon films, and they never insured the films. This formed a basis and foundation for ruling that Shapiro never attempted to promote the motion pictures.

Mr. Frank Johnson discussed with me how Henry Schwartzman actually determined the amount of cash to be set forth in the offering material as cash down payment. He then added on the non-recourse note so that the proposed deduction by the investors would be in access to $1,000,000.00 to $2,000,000.00.

In my conversations with Dr. Burt, I found out that he was not shown the offering material or prospectuses before he paid

his money. He was shown a letter written by Cohen to James Wilcox which summarized the offering material and he was shown the appraisal of the motion picture.

Arla Reed's recollection was that he was shown the appraisal which showed the stars and the name of the motion picture and he may have been shown "Not For Brokers Use" memorandum prepared by Rowland, but he did not see the offering material or read it prior to the time he issued his first check.

When Dr. Yager came in the office, he did state that he was given the offering material ahead of time and turned it over to his attorney. Dr. Yager personally, I don't believe, actually studied the offering material accept in a very casual basis. When Mike Kickham came to the office, he had obtained the offering material ahead of time and had turned it over to his accountant at that time. Mr. Kickham advised me that he had discharged his accountant because he found out that the accountant had received a kickback from Rowland & Co.. He also had seen the "For Brokers Use Only" memorandum that the broker had given him to xerox.

When Mr. Lou Werner came into the office, he stated that he received the "Brokers Use Only" memorandums on the first motion picture. He received the offering material after he paid his money. The second motion picture he received a call from James Wilcox while he was in Greenbriar, South Carolina, during a convention. He believes that one of Shapiro's representatives flew down to Greenbriar and brought the papers which he signed and he gave them a check when he invested in the second limited partnership. He thinks the prospectuses was either given to him personally at a later date or was mailed to him.

We had meetings in April, 1982 and in May, 1982 with all the investors. We went over the various elements of the case, including the possible problem of statute of limitations, fraud on the marketplace, 10 b-5, and fraud. It was explained to the investors that they could not collect punitive damages on a securi-

ty violation and that they could only recover punitive damages on the fraud count. It was explained to the investors on several occasions that I personally didn't think the case has much money from an actual damage standpoint. The case would only be worth it if there was a substantial punitive damage recovery.

In May of 1982, we had a meeting with all the investors and gave each of them a proposed draft of the proposed complaint. I went over the entire complaint with the investors to point out their individual claims and the damages. We had obtained an estimate of the damages from their own individual accountants. I explained to them that later we'd have to have expert witnesses brought in who may be able to develop different and additional damages, especially as to loss of profits and tracing the funds into the hands of defendants and the profits they made off of the funds. I again emphasized that the case did not have a great deal of damages considering the expense that would be incurred, except for the punitive damages.

It was my opinion by April and May of 1982, that we had a sufficient document evidence along with the testimony of Donald Doerge and Frank Johnson, in my opinion, to show a conspiracy to evade the security requirements of registering as a public offering and fraud. We had reviewed and prepared an internal memorandum regarding the question of whether or not the partnerships, although formed at different times, could be considered as one integrated offering. We reviewed the S.E.C. Release 4552 of November 6, 1962, and the various cases which cited and used that release as a basis to consider whether or not separate offerings should be considered as one integrated offering. We also had at our diposal the well-known case of *Securities and Exchange Commission v. Ralston Purina Co.*, 346 U.S. 119, 126, 73 S.Ct. 981, 97 L.Ed 1494 (1953).

We were also able to obtain from the I.R.S. a copy of interrogatories used by the Internal Revenue Service directed to the partnerships and general partners and organizers. We were able

to adapt most of the requests for documents into our subsequent motions for inspection of documents and interrogatories.

Mr. Frank Johnson had advised me that Davis never had more than two or three prints of any of the films. It would be impossible to obtain any kind of a gross with only two or three prints. He stated generally that to have any kind of a gross you would need anywhere from one to three hundred prints back in 1975 and 1976 in order to obtain any kind of gross income to recoup the cost of $1,500,000.00, $2,000,000.00 or $3,000,000.00.

Prior to the time we filed suit, I also had an opportunity to talk with Mr. James Wilcox who is now living in California, and was working for a brokerage firm. Mr. Doerge had given me his phone number. He advised that he was selling real estate tax shelters. He advised me that he did take a trip to Florida on one occasion and he made at least one trip to New York. He may have made two trips to New York, but he could not recall exactly. His primary contact was Henry Schwartzman. When anything came up, he would contact Henry Schwartzman. He was advised and it became known in the business that Henry Schwartzman was considered the genius behind motion picture tax shelters. Mr. Wilcox said he had some questions regarding the prospectuses and the question of disclosure, but Henry Schwartzman had assured him that everything was absolutely correct and that no one would be successful in attacking the prospectus. Mr. Wilcox said he had talked with John Short over at Peper, Martin's law firm. John Short, he recalled, raised some question as to whether or not the offering material gave full disclosure. There was also a question in Mr. Wilcox' mind about using the "For Broker's Use Only" documents, but Mr. Rust insisted that this was the quickest and best way to sell the partnership interest. Mr. Wilcox, in one of our phone conversations, stated he never did inquire about the copyrights and, as far as he could remember, he never thought about asking about copyrights nor did the subject ever come up. I asked him if he

ever checked out the calculations to check their veracity as to the anticipated amount of money that would be needed to pay off the notes. He stated that he did not.

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I took the distribution agreements from Antares and subsequently with the other partnerships and made calculations by using hypothetical figures to determine how much gross income would be required in order to pay off and have a profit. I used the assumptions that were provided to Mr. Bastien which were given to him by his broker. There were four different assumptions based upon different types of gross income and used the distribution agreements set out in the Antares offering material. My recollection is that I also made these same calculations with Alpine or Somerset. I wanted a comparison between the Davis partnership and the Cohen-Shapiro partnerships. In both cases the amount of gross income set out in the offering material would not generate sufficient revenues to cover the purchase price of the film as set out in the offering material. In my conference with the various investors individually and in our joint meetings in April and May of 1982 I brought these matters to the attention of the investors.

THE RICO COUNT

Sometime in 1982 and 1983 there were reported cases, mostly on appeal from the District Court, involving the Racketeering Influence Corrupt Organization Act. There was literature coming out of the American Bar Litigation Section and a few Law

Review articles were being written regarding the civil application of said act. Even though the act had been in effect about ten years it was considered primarily a criminal statute. Information came out about a case in the Eighth Circuit called *Bennett v. Berg*. Initially the Court of Appeals issued its opinion but then there was a rehearing and another opinion was rendered by the Eighth Circuit. Approximately the same time the American Bar Litigation Section was having a convention in two areas of the country. One program was being held in New York and the other in Los Angeles. This was in November of 1983. I was making arrangements to go out to Los Angeles to meet with Mr. James Wilcox and also to talk with two and maybe three potential expert witnesses in the motion picture business. Their names had been given to me by the I.R.S. attorneys handling the Deegan case out of New York. I also obtained names from several other sources.

I attended the session dealing with RICO and its civil application up to that time in Los Angeles. I also attended a session dealing with the control of documents, methods of marking and controlling the source of documents and the use of computers in cataloguing documents.

I also attempted to have a personal contact with Mr. Wilcox. This was the first time I noticed a hesistancy on his part to talk with me. He also had numerous excuses for not meeting with me. I never did meet with him.

I met with two potential expert witnesses who were familiar with limited partnerships and their application during the 1974, 1975, 1976 period. One was at the University of Southern California and the other one was at the University of California at Los Angeles. Both gentlemen reviewed my pleadings and certain documents which I had brought with me. They both suggested that it was important that discovery be completed before they would be in a position to examine the file and give the necessary opinions. They provided certain information as to the type of documents I should ask for and the type of questions to

be asked on interrogatories and depositions. They also gave me the names of several people who might be qualified to discuss the security aspects of the limited partnership private placement format and what should be disclosed in the offering material.

When I came back from the convention we were in the midst of a great deal of briefing and motions before Judge Noce in connection with the various discovery matters. It was not until after Jan. 26, 1984 that I was able to commence work on amending the pleading. Mr. Leonard Vines, Mr. Stemmler and I attempted to digest some of the material I had brought back from the convention in order to determine the proper language to be utilized in pleading a RICO claim. In my discussion with attorneys at the Seminar in Los Angeles, there was a consensus that I may have a classic case of "Pattern of Reacketeering," separate and distinct "enterprise." I finally decided upon the "predicate acts" of security fraud and mail fraud.

In October, 1984, I again attended the American Bar Litigation Section on RICO, held in New York. One of the attorneys for Defendant Shapiro was on the panel. He advised other members of the panel that I was in attendance. I subsequently met at breakfast with Mr. Robert Blakley. He was the author of the act while acting as counsel for the Senate Committee. He was helpful in suggesting a line of discovery. He also was of the opinion that the large number of partnerships formed so closely together could well fit the "Pattern of Racketeering."

On October 10, 1985, I attended the ALI-ABA Video Law Review "Civil RICO Litigation After Sedima." This was a national video seminar via satellite to thirty-seven cities. I attended in St. Louis. Based upon my investigation, factually and legally, I was convinced that we had a RICO.

SETTLEMENT DISCUSSION

Or or about February 7, 1986, during deposition in St. Louis, Attorney Michael Clear handed Jim Stemmler a note indicating

a settlement offer. The total sum was $110,000.00 with Defendant Cohen not agreeing to settle. He wanted to proceed with his counterclaim.

A meeting was held with seven of the clients on February 13, 1986. Mr. Bastian was not available. Immediately, the Plaintiffs objected to condition that Defendant Cohen would not be part of the settlement. They would only discuss settlement on the following conditions:

1) Cohen would execute release and entire case overwith as to all parties.

2) Defendants pay Court costs

3) Sanctions as to attorney fees directed against Plaintiff be dismissed

4) They would pay proportionate cost of Special Commissioner. I communicated this to Judge Bloom, the Special Commissioner. Later, I spoke with Judy Ryker, John Horgan and the attorney representing Defendant Shapiro and communicated the conditions. They could not make that decision at that time.

I received a call on February 17, 1986 from John Horgan. He told me that if agreement could be reached as to Defendants paying Court costs (if we could reach a definition of costs); the sanction against Plaintiff are eliminated, agreement made to share costs of Special Commissioner and Cohen and Preston would dismiss counterclaim and case dismissed, would the Plaintiff accept $165,000.00.

I spoke with Mike Kickham and suggested he call L. Werner. I also spoke with Dr. Burt and Arla Reed.

Mr. Kickham called back and I confirmed that Mrs. Werner had called and stated that she doubted if her husband would accept the offer. Mr. Kickham stated he would settle by himself, if he believed he could come out OK. I suggested he talk to his

personal attorney, Mr. Padberg. He said he had a call into him. Dr. Burt and Mr. Reed rejected the offer.

I then called Judy Ryker and asked if one Plaintiff wished to settle would that be possible. She said they would have to take this up with the others.

On February 19, 1986, I had a conference call with all the Defendants in California. James Stemmler and Judge Bloom were present. I discussed the meeting of Februray 13, 1986 with the clients and the conditions they imposed. I was told that Defendants would not settle with one or two Plaintiffs. They wanted the entire case settled, just as we wanted the entire case settled.

I was told to communicate the following offer:

1) Defendants would pay Court cost, i.e. filing fee, original cost of deposition and subpoena.

2) Cohen and Preston would dismiss their counterclaim and sign release.

3) Sanctions against Plaintiff would be forgiven.

4) Plaintiffs pays ½ of Special Commissioner and Defendants pay ½ of Special Commissioner.

5) Defendants, except Cohen, would pay $165,000.00.

A meeting was scheduled on Sunday, February 23, 1986. Mr. Kickham and Mr. Werner could not attend. Mr. Werner had been advised of the proposed settlement and rejected the proposal. He stated to me it was alright for the other Plaintiffs to settle, he would continue the case with Mr. Stemmler.

On February 21, 1986, I wrote each client setting forth the details of said offer, (see Exhibit A attached hereto). I also sent a copy of Mr. Kickham's request for an analysis of the case (see Exhibit B).

Mr. Stemmler communicated the offer of settlement at the February 23, 1986 meeting. He also pointed out to the Plaintiffs that the Defendants stated they would not settle with one Plaintiff. They wanted to complete settlement just as Plaintiffs wanted to complete settlement.

I also advised the Plaintiffs that Mr. Kickham was in favor of settling at $165,000.00. Mr. Stemmler recommended settling at $165,000.00 with the conditions as agreed to by the Defendants with Court costs and payment of the Special Commissioner.

This was rejected by the Plaintiffs present. Mr. Stemmler then suggested that a counter offer of $200,000.00 to $250,000.00 be made. This was rejected by the Plaintiffs.

Mr. Stemmler did bring to their attention that Defendants had threatened to sue the Plaintiffs if they lost the case.

The Parties directed us to submit a counter offer of $500,000.00. They did accept the ancillary conditions as to Court costs and payment of ½ of costs of Special Commissioner.

I sent a letter to the Defendants on February 24, 1986 (see Exhibit C) and made a counter offer of $500,000.00. On March 4, 1986, after several inquiries from Plaintiffs, I sent a letter to the Plaintiffs setting out the $500,000.00 counter offer and gave my opinion that it had been rejected since Defendants had filed their Motion for Summary Judgment (see Exhibit D). I also requested they pay up the $25,000.00 expense fund they had agreed upon previously. Since we had to proceed with the trial. All of the Plaintiffs paid their share of the money. Mr. Kickham had been excused by the other Plaintiffs from paying into this fund and the other Plaintiffs increased their proportionate share of this fund.

During the trial, it is my recollection that Dr. Burt, on at least two occasions; Mr. Bastian, once, Mr. O'Hare and Mr. Kickham (at least once each), called. They each inquired about the conduct of the trial but said nothing about settlement.

ADDITIONAL COUNSEL

Mr. Leonard Vines and James Stemmler were both assisting me in 1983, 1984, and part of 1985. Mr. Vines, because of his new partnership arrangements could not assist after July 31, 1985. I spoke with Carroll Donahue. He reviewed the file and had a general discussion with me. He had conferences with his firm. He advised me, sometime near the end of August or early September, 1985, that the decision was they could not assist. They felt that the delay in the Court not signing the order reflecting the July 31, 1985 meeting, and the immediate opposition of Defendants to the request to produce documents from five additional partnerships would prevent adequate time to complete decision. It would take too much resources considering that the matter was on a contingent fee basis.

I then contacted Jack Taylor of Lewis Rice. I was later informed that the discovery period was too short, the Defendants would probably cause further delay. It would take too much resource to complete the discovery considering the fact it was on a contingent fee basis.

I then contacted Suelthaus, Kaplan, Cunningham, Yates, Fitzsimmons & Wright firm. The firm reviewed certain aspects of the file but concluded that there was not sufficient time to complete discovery. This was already in the middle of October.

I then spoke with a John Davidson. He appeared at the November 26, 1985 hearing. He made a review of the file. I met with him again on the morning of December 18, 1985. He later wrote me stating he could only participate upon a fee arrangement which would be decided by the Bar Association sometime in the future. I received his letter after I had been discharged from the hospital. I could not agree to this arrangement.

Based upon my investigation, research and statement of clients, the Plaintiff's had a meritorious claim under RICO, Security Fraud, Fraud, Conversion, and Breach of Fiduciary Relationship.

/s/ David G. Lupo

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

COMES NOW David G. Lupo, who, under oath and before me appeared in person and stated that the above facts are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me this 29th day of July, 1987.

illegible
Notary Public

My Commission expires _____.